No. 17-949	
Title:	John Sturgeon, Petitioner v. Bert Frost, in His Official Capacity as Alaska Regional Director of the National Park Service, et al.
Docketed:	January 5, 2018
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(13-36165)
Decision Date:	October 2, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jan 02 2018	Petition for a writ of certiorari filed. (Response due February 5, 2018) **Petition** **Certificate of Word Count** **Proof of Service**
Feb 05 2018	Brief amicus curiae of State of Alaska filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 05 2018	Amicus brief of Citizens Equal Rights Foundation not accepted for filing. (February 09, 2018)
Feb 05 2018	Motion to extend the time to file a response from February 5, 2018 to March 7, 2018, submitted to The Clerk. **Main Document**
Feb 05 2018	Brief amicus curiae of Citizens Equal Rights Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 06 2018	Motion to extend the time to file a response is granted and the time is extended to and including March 7, 2018.
Feb 28 2018	Motion to extend the time to file a response from March 7, 2018 to April 6, 2018, submitted to The Clerk. **Main Document**
Mar 01 2018	Motion to extend the time to file a response is granted and the time is further extended to and including April 6, 2018.
Apr 02 2018	Motion to extend the time to file a response from April 6, 2018 to May 7, 2018,

	submitted to The Clerk. **Main Document**
Apr 03 2018	Motion to extend the time to file a response is granted and the time is extended to and including May 7, 2018
May 07 2018	Brief of respondents Bert Frost, et al. in opposition filed. **Proof of Service** **Main Document**
May 21 2018	Reply of petitioner John Sturgeon filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 22 2018	DISTRIBUTED for Conference of 6/7/2018.
Jun 11 2018	DISTRIBUTED for Conference of 6/14/2018.
Jun 18 2018	Petition GRANTED.
Jul 18 2018	Motion for an extension of time to file the opening briefs on the merits filed. **Main Document** **Proof of Service**
Jul 31 2018	Motion to extend the time to file the opening briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 7, 2018. The time to file respondents brief on the merits is extended to and including September 11, 2018.
Aug 02 2018	Blanket Consent filed by Petitioner, John Sturgeon **Blanket Consent**
Aug 06 2018	Motion to dispense with printing the joint appendix filed by petitioner John Sturgeon. **Main Document** **Proof of Service**
Aug 07 2018	Brief of petitioner John Sturgeon filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 09 2018	Brief amicus curiae of State of Idaho, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 14 2018	Brief amicus curiae of Pacific Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 14 2018	Brief amicus curiae of State of Alaska filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Aug 14 2018	Brief amicus curiae of Safari Club International filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Aug 14 2018	Brief amicus curiae of Ahtna, Inc. in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 14 2018	Brief amici curiae of Citizens Equal Rights Foundation and Central New York Fair Business Association filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Aug 20 2018	SET FOR ARGUMENT on Monday, November 5, 2018
Sep 06 2018	Motion of State of Alaska for leave to participate in oral argument as amicus curiae and for divided argument filed. **Main Document** **Proof of Service**
Sep 10 2018	Record requested from the U.S.C.A. 9th Circuit.
Sep 11 2018	Brief of respondents Bert Frost, et al. filed. (Distributed) **Proof of Service** **Main Document**
Sep 12 2018	CIRCULATED
Sep 17 2018	Brief amici curiae of Law Professors filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service** **Other**
Sep 18 2018	Brief amici curiae of National Parks Conservation Association, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 18 2018	Brief amici curiae of Alaska Native Subsistence Users filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service** **Other**
Sep 19 2018	Record received from the U.S.D.C. District of Alaska is electronic and located on PACER with the exception of 1 envelope of Clerk's Files.
Oct 01 2018	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Oct 09 2018	Motion of State of Alaska for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kavanaugh took no part in the consideration or decision of this motion.
Oct 11 2018	Reply of petitioner John Sturgeon filed. (Distributed)

	Main Document	Certificate of Word Count	Proof of Service
Nov 05 2018	Argued. For petitioner: Matthew T. Findley, Anchorage, Alaska; and Ruth Botstein, Assistant Attorney General, Anchorage, Alaska (for Alaska, as amicus curiae.) For respondents: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C.		

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Party name: National Parks Conservation Association, Defenders of Wildlife, The Wilderness Society, American Rivers, Center for Biological Diversity, Sierra Club, Wilderness Watch, Denali Citizens Council, Copper Country Alliance, Alaska Quiet Rights Coalition, Northern Alaska Environmental Center, Friends of Alaska National Wildlife Refuges, Alaska Wilderness League

No. 17-

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Alaska National Interest Lands Conservation Act prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is John Sturgeon.

Respondents are Bert Frost, in his official capacity as Alaska Regional Director of the National Park Service; Greg Dudgeon; Andee Sears; Ryan Zinke, Secretary of the Interior; Michael Reynolds, in his official capacity as Acting Director of the National Park Service; The National Park Service; and The United States Department of the Interior.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Sturgeon submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 872 F.3d 927 and is reproduced in the Appendix ("App.") at 1a-23a. The Ninth Circuit's earlier opinion is reported at 768 F.3d 1066 and is reproduced at 26a-57a. The Ninth Circuit's earlier order denying rehearing en banc is unreported and is reproduced at App. 24a-25a. This Court's opinion vacating the Ninth Circuit's earlier opinion is reported at 136 S. Ct. 1061. The opinion of the United States District Court for the District of Alaska is available at 2013 WL 5888230 and is reproduced at App. 58a-81a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its decision on October 2, 2017. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reproduced in an appendix to this brief. App. 82a-88a.

INTRODUCTION

State ownership of submerged lands is an "essential attribute" of sovereignty. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). Federalism thus depends in no small measure on the understanding that the States "'hold the absolute right to all their navigable waters and the soils under them,' subject only to rights surrendered and powers granted by the Constitution to the Federal Government." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590 (2012) (quoting *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (1842)). That ownership extends not only to navigable waters themselves, but also to the resources located within them. *United States v. California*, 436 U.S. 32, 37 (1978).

This dispute implicates these important concerns. It "touch[es] on vital issues of state sovereignty, on the one hand, and federal authority, on the other." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1072 (2016). Previously, this Court preserved Alaska's sovereignty by holding that the Alaska National Interest Lands Conservation Act ("ANILCA") barred the National Park Service ("NPS") "from regulating 'non-public' land in Alaska as if that land were owned by the Federal Government." *Id.* at 1068. But on remand the Ninth Circuit sidestepped that holding by concluding that the Nation River is actually "public land" because, given its navigability, the Unites States holds a "reserved water right." App. 9a-19a.

This is a crushing blow to Alaska's sovereignty. By holding that the United States has a title interest in all Alaska waterways located within federal Conservation System Units ("CSUs"), the Ninth Circuit has placed a

significant percentage of Alaska's vast navigable waters in federal receivership. NPS now has nearly limitless power over these non-federal waters. And, because reserved water rights apply to all waters appurtenant to federal land, waters far outside CSUs could now be transformed into public lands too. Converting non-federal waters into public lands impacts surrounding State, Native, and private uplands because NPS may issue regulations to protect the newly "public" waters. Such regulation, in turn, would severely restrict Alaskans from beneficially using their natural resources.

But, unlike the previous question the Court decided, this expansion of federal authority is not limited to Alaska. Many federal statutes, including those creating national parks, define public lands in the same manner as ANILCA. If the Ninth Circuit's ruling stands, the United States may claim it has reserved water rights in any standing water, wetland, or groundwater throughout the West, converting them into public lands subject to plenary federal control, all without paying compensation. This is an urgent issue of state sovereignty.

Review is all the more warranted because the Ninth Circuit's ruling is indefensible. A reserved water right does not create a title interest, and concluding that ANILCA did so here cannot overcome the clear statement rule. Even if it did, the hovercraft ban far exceeds the scope of that right. It defies reason, history, and precedent to conclude that the existence of an implied reserved water right can nullify traditional state control over navigable waters and the resources in them by rendering those waters "public land." Ultimately, NPS's arguments all run into the same obstacle. As this Court held, ANILCA's

whole point was to keep NPS from imposing precisely this type of restriction on non-federal land. The Court should make this clear once and for all.

STATEMENT OF THE CASE

A. Land Allocation in Alaska

Alaska contains 586,000 square miles of land and 95,000 square miles of water. It is one-fifth the size of the lower 48 states, 488 times larger than Rhode Island, and two and a half times bigger than Texas. Alaska contains more land than the next three largest states in the United States combined and more than twice the water of any other state. At the same time, Alaska supports a total population of only 710,231 people and most of it is inaccessible by road. Indeed, Alaska's average population density is only 1.2 persons per square mile. If Manhattan had the same population density as Alaska, 28 people would live there. Fairly allocating land and resources in this vast landscape and ensuring the economic well-being of its people have been vitally important issues since Alaska joined the Union in 1959.

Before statehood, the United States owned 98% of Alaska's land and waters. *Sturgeon*, 136 S. Ct. at 1065. To ensure the new state's economic viability, Congress granted 103,350,000 acres of land to Alaska (or 28% of its overall area) and required that any further conveyance of this land must reserve mineral and other rights to the State. *Id.* Congress also granted Alaska "'title to and ownership of the lands beneath navigable waters' within the State, in addition to 'the natural resources within such lands and waters,' including 'the right and power

to manage, administer, lease, develop, and use the said lands and natural resources.'" *Id.* (quoting 43 U.S.C. § 1311(a)). Because of these grants, Alaska could "fulfill its state policy 'to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.'" *Id.* (quoting Alaska Const. Art. VIII, § 1).

Statehood, however, did not resolve the land claims of Alaska Natives. Congress resolved these issues in 1971 by passing the Alaska Native Claims Settlement Act ("ANCSA") to provide "a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). ANCSA extinguished Alaska Natives' aboriginal land claims in exchange for $960 million, allowing Alaska Native-owned corporations to select 40 million acres of federal land in Alaska. *Sturgeon*, 136 S. Ct. at 1065. Congress intended for the Native Corporations to use these lands and assets for economic development that would benefit the Native peoples of Alaska. 43 U.S.C. § 1607.

ANCSA also addressed land allocation between the State of Alaska and the United States by directing the Secretary of the Interior to withdraw up to 80 million acres of federal land for potential inclusion as "units of the National Park System[]." 43 U.S.C. § 1616(d)(2). But this process was not completed because the withdrawals never received the required Congressional approval. *Sturgeon*, 136 S. Ct. at 1065. In response, the Carter administration withdrew over 100 million acres of land, designating over 56 million acres of it as national monuments. Proclamation No. 4611, 43 Fed. Reg. 57,009 (Dec. 5, 1978) (Admiralty Island National Monument); Public Land Order No. 5653,

43 Fed. Reg. 59,756 (Dec. 21, 1978); Public Land Orders 5696-5711, 45 Fed. Reg. 9562 (Feb. 12, 1980).

B. The Alaska National Interest Lands Conservation Act

Alaskans protested the Carter withdrawals because they subjected these lands to intrusive federal regulation. *Sturgeon*, 136 S. Ct. at 1065-66. Congress passed ANILCA to address their concerns. 94 Stat. 2371, 16 U.S.C. § 3101 *et seq.* ANILCA had two goals: "First, to provide 'sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska.' And second, to provide 'adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Sturgeon*, 136 S. Ct. at 1066 (quoting 16 U.S.C. § 3101(d) (citation omitted)); *City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984) ("Congress became aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use.").

ANILCA affected 104 million acres of Alaskan land; it expanded the National Park System by over 43 million acres, creating ten new national parks, preserves, and monuments and tripling the nation's federal wilderness preservation acreage. *Sturgeon*, 136 S. Ct. at 1066; 16 U.S.C. § 410hh. It also rescinded the Carter designations. *Id.* ANILCA divided all these federal preservation lands into CSUs. *Sturgeon*, 136 S. Ct. at 1066. As part of this Park System expansion, ANILCA created the Yukon-Charley Rivers National Preserve ("Yukon-Charley") as

a CSU in east-central Alaska, west of the village of Eagle. 16 U.S.C. § 410hh(10).

Essential to the compromise ANILCA embodied was Congress's assurance that the millions of acres of land previously set aside for the economic and social needs of the Alaskan people would not be subject to federal control and management. This was an acute concern because CSU boundaries were drawn to follow natural features in the landscape, rather than property lines. As a consequence, the new CSUs encompassed within their boundaries over 18 million acres of State, Native Corporation, and private land. *Sturgeon*, 136 S. Ct. at 1066.

To ensure that these lands would remain available for the economic and social needs of Alaskans despite being newly surrounded by federal CSUs, ANILCA included an express assurance that these lands would be free from federal control:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

Congress defined key terms such as "land," "federal land," and "public lands." "Land" means "lands, waters, and interests therein." 16 U.S.C. § 3102(1). "Federal land" means "lands the title to which is in the United States after December 2, 1980." *Id.* § 3102(2). And "public lands" means "land situated in Alaska which, after December 2, 1980, are Federal lands" except for land selected by the State of Alaska or a Native Corporation the title to which has not yet been conveyed. *Id.* § 3102(3). In addition, the statute defines "conservation system unit" to include the NPS units addressed by ANILCA. *Id.* § 3102(4). Read together with these definitions, Section 103(c) provides that "only 'lands, waters, and interests therein' to which the United States has 'title' are considered 'public' land 'included as a portion' of the conservation system units in Alaska." *Sturgeon*, 136 S. Ct. at 1067.

Section 103(c)'s purpose was apparent from the start of the legislative process. It began as an amendment to "make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling). "Those private lands, and those public lands owned by the State of Alaska," accordingly, "are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413, at 303 (Nov. 14, 1979).

Arizona Congressman Morris Udall, ANILCA's primary sponsor in the House of Representatives, furtner explained that:

> this bill... is a direct out-growth of the Alaska Native Claims Settlement Act of 1971.... Thus, it is important to recall the relationship between the conservation system units ... and the lands which the Native peoples of Alaska have received and will receive pursuant to the Alaska Native Claims Settlement Act in return for the extinguishment of their claims based on aboriginal title. We recognize that there are certain lands which have been selected by Native Corporations and which are within the exterior boundaries of some of the conservation system units .... I want to make clear that inclusion of these Native lands within the boundaries of conservation system units is not intended to affect any rights which the Corporations may have under this act, the Alaska Native Claims Settlement Act, or any other law, or to restrict use of such lands by the owning Corporations nor to subject the Native lands to regulations applicable to the public lands within the specific conservation system unit.

125 Cong. Rec. 9905 (1979).

Senator Ted Stevens of Alaska agreed:

> The fact that Native lands lie within the boundaries of conservation system units is not intended to affect any rights which the

> corporations have under this act, the Alaska Native Claims Settlement Act, or any other law. It is not our intent, by the inclusion of Native lands within the exterior boundaries of conservation system units, to imply that such inclusion is a revocation of land selections validly filed pursuant to any provision of the Alaska Native Claims Settlement Act. The Native organizations have been given repeated assurances that including their lands within conservation units will not affect the implementation of the Native Claims Settlement Act. We intend to have these assurances translated into practice by the administrative agencies.

126 Cong. Rec. 21,882 (1980).

On that understanding, Section 103(c) was added to the final version of ANILCA via concurrent resolution. H. Con. Res. 452, 96th Cong. (1980). The amendment was made to firmly establish "that only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands." 126 Cong. Rec. 30,498(1980) (statement of Rep. Udall).

C. ANILCA's Regulatory History

For sixteen years following the statute's enactment, NPS interpreted ANILCA to deny it authority to regulate State, Native Corporation, and private lands physically located within CSUs. In 1981, NPS issued regulations to "provide interim guidance on public uses of National Park System units in Alaska, including units established

by the Alaska National Interest Lands Conservation Act." 46 Fed. Reg. 31836 (June 17, 1981). The preamble explained that:

> Sections 103(c) and 906(o) of ANILCA generally restrict the applicability of National Park Service regulations to federally owned lands within park area boundaries. Consistent with the statute and the explanatory legislative history ... § 13.2(e) restricts the applicability of these regulations to 'federally owned' lands (defined to mean all land interests held by the Federal government including unconveyed Native selections) within park area boundaries .... These regulations would not apply to activities occurring on State lands. Similarly, these regulations would not apply to activities occurring on Native or any other non-federally owned land interests located inside park area boundaries.

Id. at 31843.

As promulgated in 1983, 36 C.F.R. § 1.2(b) provided that:

> The regulations contained in Parts 1 through 7 of this chapter are not applicable on privately owned lands and waters (including Indian lands and waters owned individually or tribally) within the boundaries of a park area, except as may be provided by regulations relating specifically to privately owned lands and waters under the legislative jurisdiction of the United States.

48 Fed. Reg. 30275 (June 30, 1983).

36 C.F.R. § 1.4 defined "legislative jurisdiction" to mean "lands and waters under the exclusive or concurrent jurisdiction of the United States." 48 Fed. Reg. at 30261. NPS added that the regulation was "intended to also include state inholdings that are under the legislative jurisdiction of the United States." *Id.*

Confusion nonetheless persisted as to the regulatory status of State-owned lands and the meaning of the phrase "legislative jurisdiction of the United States." In 1987, NPS resolved the confusion by revising Section 1.2(b). As revised, the regulation provided:

> Except for regulations containing provisions that are specifically applicable, regardless of land ownership, on lands and waters within a park area that are under the legislative jurisdiction of the United States, the regulations contained in Parts 1 through 5 and Part 7 of this chapter do not apply on non-federally owned lands and waters or on Indian lands and waters owned individually or tribally within the boundaries of a park area.

52 Fed. Reg. 35239 (Sept. 18, 1987).

NPS resolved the question as to State-owned lands by broadening the regulation to cover all "non-federally owned lands and waters or on Indian lands and waters." As to the meaning of the "legislative jurisdiction of the United States," NPS explained that "when applied to non-federal lands, [it] means lands and waters over which the

State has ceded some or all of its legislative authority to the United States." *Id.* at 35238.

NPS reversed course in 1996, extending all of its regulations to non-federal lands in Alaska. To accomplish this, NPS issued 36 C.F.R. § 1.2(a)(3), which provides that NPS regulations apply to "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters ... *without regard to the ownership of submerged lands, tidelands, or lowlands.*" 61 Fed. Reg. 35136 (July 5, 1996) (emphasis added). NPS revised 36 C.F.R. § 1.2(b) to provide that the "regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, *except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.*" *Id.* (emphasis added). Among the NPS regulations made applicable to State-owned lands is 36 C.F.R. § 2.17(e), which bans the use of hovercraft within NPS boundaries.

D. Factual Background

John Sturgeon has hunted moose along the Nation River in Alaska for nearly 40 years. *Sturgeon*, 136 S. Ct. at 1064. From 1990 until the events giving rise to this suit, he traveled by means of a small personal hovercraft, which allowed him to float over the river's shallow, difficult portions to his preferred hunting grounds. App. 18a. Part of Mr. Sturgeon's route along the Nation River lies within the Yukon-Charley, though the grounds themselves are not. *Sturgeon*, 136 S. Ct. at 1064.

Because the Nation River is navigable, *Alaska v. United States*, 201 F.3d 1154, 1158 (9th Cir. 2000), the State of Alaska holds title to the riverbed and "'the natural resources within such lands and waters,' including 'the right and power to manage, administer, lease, develop, and use the said lands and natural resources.'" *Sturgeon*, 136 S. Ct. at 1065 (quoting 43 U.S.C. §1311(a)). Under Alaska law, Mr. Sturgeon may use his hovercraft on the Nation River. *Id.* at 1064.

In the fall of 2007, Mr. Sturgeon entered the Nation River from the Yukon River by hovercraft en route to his usual hunting grounds. *Id.* at 1066. Approximately two miles upriver, while stopped on a gravel bar to repair the hovercraft's steering cable, he was approached by Park Service rangers. *Id.* at 1066-67. They informed him that it was a crime to operate the hovercraft in the Yukon-Charley. *Id.* Mr. Sturgeon explained that the prohibition did not apply because the hovercraft was on a State-owned waterway. *Id.* at 1067. The rangers nevertheless ordered him to remove his hovercraft from within the boundaries of the Yukon-Charley. *Id.*

After returning from his thwarted hunting trip, Mr. Sturgeon communicated with NPS Special Agent Andee Sears in Anchorage, Alaska. App. 72a. She acknowledged that the State owned the Nation River's submerged lands, but insisted that hovercraft use within the Yukon-Charley was a federal crime, even on navigable waters and State-owned submerged lands, and would subject Mr. Sturgeon to criminal citation. App. 31a. Fearing federal prosecution, Mr. Sturgeon stopped using his hovercraft in the Yukon-Charley. *Sturgeon*, 136 S. Ct. at 1067.

E. Procedural History and this Court's Ruling

On September 14, 2011, Mr. Sturgeon filed suit in the U.S. District Court for the District of Alaska to, *inter alia*, enjoin NPS from applying its hovercraft regulation to the Nation River. App. 59a; 36 C.F.R. §§ 1.2(a)(3), 2.17(e). He argued that ANILCA prohibited NPS from enforcing its hovercraft ban on the Nation River because: (1) the Nation River was a "land[] ... conveyed to the State," because the Alaska Statehood Act and the Submerged Lands Act gave Alaska ownership of the submerged lands beneath (and the resources within) the navigable waters in Alaska; and (2) the hovercraft ban was a "regulation[] applicable solely to public lands within such units" as it applied "solely" by virtue of NPS's authority to manage national parks. App. 59a-60a.

The district court granted summary judgment to NPS. App. 75a-81a. The court held that 54 U.S.C. § 100751 and its corresponding regulation, 36 C.F.R. § 1.2, gave NPS the authority to ban the use of hovercraft on the Nation River because the river's bed and waters were lands "within the boundaries" of an ANILCA conversation system unit (the Yukon-Charley). App. 76a. Section 103(c), the court concluded, did not limit that authority. Even assuming that the Nation River had been "conveyed" to the State and was not a "public land," 16 U.S.C. § 3103(c), the hovercraft regulation was not applicable "solely" to public lands within CSUs; it was of "general application across the entirety of the NPS." App. 75a-81a. ANILCA thus did not prohibit application of the NPS hovercraft regulation to activities on the Nation River.

The Ninth Circuit affirmed. It held that because the hovercraft ban "applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks," it is not a "'regulation[] applicable *solely* to public lands within [CSUs].'" App. 49a (quoting 16 U.S.C. § 3103(c)). Accordingly, "even assuming (without deciding) that the waters of and lands beneath the Nation River have been 'conveyed to the State' for purposes of § 103(c), that subsection does not preclude the application and enforcement of the NPS regulation at issue." *Id.* ANILCA did not override NPS authority to regulate "'boating and other activities on or relating to water located within [CSUs].'" *Id.* (quoting 54 U.S.C. § 100751).

This Court granted certiorari and vacated the Ninth Circuit's judgment. The Court found the Ninth Circuit's reading of Section 103(c) to be "inconsistent with both the text and context of the statute as a whole." *Sturgeon*, 136 S. Ct. at 1070. Under such an interpretation, NPS "may apply nationally applicable regulations to 'non-public' lands within the boundaries of conservation system units in Alaska, but it may not apply Alaska-specific regulations to those lands." *Id.* That was a "surprising conclusion" because "ANILCA repeatedly recognizes that Alaska is different—from its 'unrivaled scenic and geological values,' to the 'unique' situation of its 'rural residents dependent on subsistence uses,' to 'the need for development and use of Arctic resources with appropriate recognition and consideration given to the unique nature of the Arctic environment.'" *Id.* (quoting 16 U.S.C. §§ 3101(b), 3111(2), 3147(b)(5)). The Ninth Circuit's interpretation, in sum, could not be reconciled with the fact that "Alaska is often the exception, not the rule." *Id.* at 1071.

The Court acknowledged that NPS had made other arguments in defense of its regulation, which the parties had briefed and argued. *Id.* at 1072. First, the parties disputed "whether the Nation River qualifies as 'public land' for purposes of ANILCA." *Id.* Second, the parties disputed "whether the Park Service has authority under Section 100751(b) to regulate Sturgeon's activities on the Nation River, even if the river is not 'public' land, or whether—as Sturgeon argues—any such authority is limited by ANILCA." *Id.* And, third, the parties disputed whether NPS "has authority under ANILCA over both 'public' and 'non-public' lands within the boundaries of [CSUs] in Alaska, to the extent a regulation is written to apply specifically to both types of land." *Id.*

The Court remanded. First, the erroneous interpretation of Section 103(c) was "the sole basis for the disposition of this case by the Court of Appeals." *Id.* at 1071. Second, because the parties' other disputes "touch[ed] on vital issues of state sovereignty, on the one hand, and federal authority, on the other," they "should be addressed by the lower courts in the first instance." *Id.* at 1072.

F. Proceedings on Remand

The Ninth Circuit affirmed. This time, the court held that the Nation River is "public land" under ANILCA because "the United States has an implied reservation of water rights" in it. App. 19a. Therefore, Section 103(c)'s ban on extending regulations "applicable solely to public lands" to non-federal Alaska lands was not an obstacle to prohibiting hovercraft.

The Ninth Circuit pointed to the fact that "[u]nder the Submerged Lands Act, '[t]he United States retains all its navigational servitude and rights in and powers of regulation and control of [submerged] lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs.'" App. 11a (quoting 43 U.S.C. § 1314(a)). But the court also recognized that a "navigational servitude is not 'public land' within the meaning of ANILCA' because 'the United States does not hold title to the ... servitude.'" *Id* (quoting *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986)). That was because, among other reasons, "Congress did not intend 'to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters' when it enacted ANILCA." *Id.* (quoting *Alaska v. Babbitt (Katie John I)*, 72 F.3d 698, 703 (9th Cir. 1995)).

The Ninth Circuit nevertheless concluded that the Nation River is "public land" under ANILCA pursuant to the "reserved water rights doctrine." App. 17a. To reach that conclusion, it relied on circuit precedent known as the *Katie John* decisions. App. 11a-13a; (discussing *Katie John I*, 72 F.3d 698; *John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001); *John v. United States (Katie John III)*, 720 F.3d 1214 (9th Cir. 2013)). In those decisions, the Ninth Circuit held that "public lands," in the context of ANILCA's Title VIII subsistence provisions, included navigable waters where the federal government has reserved water rights. *Katie John I*, 72 F.3d at 703-04. This conclusion was mainly driven by the Ninth Circuit's desire to give effect to ANILCA's subsistence provisions and to act in accordance with what it saw as clear congressional intent to protect subsistence fishing by rural residents. *Katie John I*, 72 F.3d at 702 n.9; *Katie*

John II, 247 F.3d at 1037 (Tallman, J., concurring in the judgment).

Applying the reserved water rights doctrine, the Ninth Circuit held that "'[t]he United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes,' including ANILCA, and thereby has 'implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations.'" App. 12a (quoting *Katie John I*, 72 F.3d at 703 & n.10). "This reservation of water rights gave the United States 'interests in some navigable waters'" and, as a result, "ANILCA's 'definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine.'" *Id.* (quoting *Katie John I*, 72 F.3d at 703).

The Ninth Circuit held that the *Katie John* cases foreclosed Mr. Sturgeon's challenge to NPS's hovercraft ban. App. 13a-18a. While that line of precedent had been applied in markedly different circumstances, the Ninth Circuit found no basis to draw a distinction here. Pointing to "ANILCA's purpose of 'provid[ing] sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska,'" App. 14a (quoting 16 U.S.C. § 3101(d)), and to the pre-ANILCA steps the Carter Administration took to reserve the Yukon-Charley for environmental purposes, the court held that the hovercraft ban was needed to accomplish the purpose of the reservation, App. 14a-16a. While conceding that "'[r]eserved water rights are not a "title" interest,'" the Ninth Circuit found that true only "in a narrow, technical sense" because the "word 'title'

has many meanings." App. 16a-17a. "Thus, 'title' to an 'interest' in water almost certainly means a vested interest in the water, such as a reserved water right." App. 17a.

Last, the court disagreed that the ban exceeds whatever reserved rights the United States holds, even though the use of hovercraft does not jeopardize the Nation River's water level or navigability, or otherwise compromise any interest the United States might hold in it. App. 17a-18a. In the Ninth Circuit's view, NPS may seize control of "'all bodies of water on which the United States' reserved rights *could at some point* be enforced—*i.e.*, those waters that are or *may become necessary* to fulfill the primary purposes of the federal reservation at issue.'" App. 18a (quoting *Katie John III*, 720 F.3d at 1231). "Here, one of the reservation's primary purposes is to protect fish. The diminution of water in any of the navigable waters within Yukon-Charley's boundaries would necessarily impact this purpose, giving rise to a reserved water right." *Id.*

Besides writing the majority opinion, Judge Nguyen issued a concurrence that Judge Nelson joined. App. 20a-23a. She agreed the panel was "bound by [its] *Katie John* decisions to analyze this case under the reserved water doctrine." App. 20a. However, that was "unfortunate" because "[a] reserved water right is the right to a sufficient *volume* of water for use in an appropriate federal purpose" and this case has "nothing to do with that." *Id.* Judge Nguyen instead would have upheld the NPS hovercraft ban under the federal government's power to "regulate navigation on navigable waters" under the Commerce Clause, *id.*, even though Congress had declined to exercise that power in enacting ANILCA, App. 11a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Ninth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c).

I. The Petition Raises a Question of Exceptional Importance for the People of Alaska.

In previously granting review, the Court correctly recognized that this case raises important issues. Indeed, it is difficult to conceive of an issue of greater importance to the people of Alaska than the one presented here. This case concerns the regulatory disposition of more than 18 million acres of Alaskan land. Perhaps more than any other State, Alaska depends on the beneficial use of its land for "economic and social well-being." *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). Yet if the Ninth Circuit's judgment is upheld, the ability of Alaskans to productively use their natural resources will be subject to the plenary control of NPS, which prefers to reserve the Alaska wilderness strictly for conservation purposes. As a result, it is likely that the developmental potential of this land will be unrealized.

The ramifications of this case for the Alaskan people were a compelling basis for granting review last time, and the basis for granting review is no less compelling now. If anything, the case for certiorari is even stronger here. Last time, the question before the Court was purely statutory and limited to Alaska. *Sturgeon*, 136 S. Ct. at 1068-72. This case again calls on the Court to interpret ANILCA; ultimately, the Ninth Circuit held on remand

that the Nation River is "public land" within the meaning of ANILCA. But because "only 'lands, waters, and interests therein' to which the United States has '*title*' are considered 'public' land" under the statute, *Sturgeon*, 136 S. Ct. at 1067 (emphasis added), the Ninth Circuit's ruling that United States holds title to the Nation River, and potentially other navigable rivers in States across the West, raises the stakes of this dispute considerably.

As this Court has often explained, "ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water is an essential attribute of sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013). By virtue of the Equal Footing doctrine, all States (including Alaska) have an "absolute right" to their waters, *PPL Montana*, 569 U.S. at 590, under which they hold "title to the navigable waters and their beds in trust for the public," *id.* at 604. Alaska's Constitution thus requires its waters to be reserved "to the people for common" and "beneficial uses." Alaska Const. Art. VIII, §§ 3, 13.

To be sure, the United States possesses some power over navigable waters so that it may, for example, control interstate commerce. *See generally Gibbons v. Ogden*, 22 U.S. 1 (1824). But such power represents a reservation of narrowly-defined rights, *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991), and an agency's exercise of that authority must be pursuant to an express congressional command. Otherwise, control over water belongs to the States.

Nowhere is this bedrock principle more important than in Alaska. Alaska is home to over 40% of the nation's

surface waters. Its 12,000 rivers, millions of lakes, and innumerable creeks and ponds add up to nearly 95,000 square miles of water. Control over the resources in these waters, particularly salmon, was the primary driving force behind Alaska Statehood. *Pullen v. Ulmer*, 923 P.2d 54, 57 n.5 (Alaska 1996). Because much of Alaska is inaccessible by road, moreover, Alaska's navigable waters are essential to the transportation of people and goods throughout the State, rendering them indispensable to the survival and prosperity of many Alaskans. That is why the State must "provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people." Alaska Const. Art. VIII, § 2.

But this is not news to the Court, which has long been concerned with Alaska's sovereignty over its waters. Shortly after Alaska achieved statehood, this Court heard a case on Alaska's ability to tax commercial fishing in its (formerly territorial) waters "because of the importance of the ruling to the new State of Alaska." *Alaska v. Arctic Maid*, 366 U.S. 199, 202 (1961). Since then, this Court has consistently granted review of controversies between Alaska and the United States over the State's authority to deploy its natural resources—especially its submerged lands—for the beneficial use of Alaska's citizens. *See, e.g.*, *United States v. Alaska*, 422 U.S. 184 (1975); *United States v. Alaska*, 503 U.S. 569 (1992); *United States v. Alaska*, 521 U.S. 1 (1997); *Alaska v. United States*, 545 U.S. 75 (2005).

As the Court recognized in previously reviewing this case, the Ninth Circuit's ruling implicates these concerns. The Ninth Circuit held that NPS may pervasively regulate most of Alaska's navigable waters flowing through CSUs

as "public lands." That means NPS can impose *any* restriction that it believes will "conserve the scenery, natural and historic objects, and wild life." 54 U.S.C. § 100101(a). In practice, NPS wields this vast authority to restrict a broad array of activities, including fishing, swimming, boating, water skiing, and water sanitation. 36 C.F.R. §§ 2.3, 2.14; *id.* at Part 3. From a state sovereignty perspective, this is untenable. As remade by the Ninth Circuit, the reserved water rights doctrine is a jurisdictional grant of federal authority instead of functioning (like it has historically) as a narrow exception meant to accommodate a federal interest in the right to use (or prevent use of) a certain volume of water. The Ninth Circuit should not be allowed to transform the reserved water rights doctrine into a vehicle for expanding federal control over State waterways.

Worse still, the Ninth Circuit dramatically lowered the bar for asserting reserved water rights in the first place. Under this Court's decisions, each assertion of a reserved water right has required "careful examination" of "both the asserted water right and the specific purpose for which the land was reserved" to determine whether "without the water the purposes of the reservation would be entirely defeated." *United States v. New Mexico*, 438 U.S. 696, 700-01 (1978). But in the Ninth Circuit, virtually any federal regulatory policy can now serve as the justification for asserting a reserved water right.

This case proves the point. The Ninth Circuit should have engaged in a "careful examination" to evaluate if Congress, in ANILCA, reserved specific quantities of water based on particular environmental concerns. Instead, the court assumed that because environmental

preservation is one of ANILCA's goals, and because waterways can affect neighboring ecosystems, NPS can claim a reserved water right for any nonspecific environmental purpose it wishes. The result is an open door for NPS and other agencies to broadly wield reserved water rights in Alaska, and across the West, to render these "public lands" off limits to the public in the name of environmental protection.

This amounts to an unprecedented takeover of non-federal waterways. 278,000 square miles—almost half of Alaska's land mass—are federally reserved. ANILCA's CSUs contain over 43,000 miles of river, many of them navigable, and over 5,100 square miles of lakes. Many of these rivers and lakes overlay Native Corporation land. If this ruling stands, the United States will merely need to assert reserved water rights to convert any of these non-federal waterways into "public land."

And this likely *understates* the scope of the federal takeover given that the doctrine applies to "appurtenant water," not just non-federal waterways located within the boundaries of federally-reserved land. *Cappaert*, 426 U.S. at 138. Rivers are fed by streams and lakes, and their composition is affected by wetlands and groundwater. The decision below thus invites the NPS to assert jurisdiction over State, Native corporation, and private lakes, streams, wetlands, and groundwater based on some connection—however remote—to units of the National Park System.

In *Cappaert*, in fact, the United States successfully claimed reserved water rights in groundwater on private land two-and-a-half miles outside Devil's Hole National Monument and, as a result, was able to regulate how these

private landowners accessed their own groundwater. At least there, however, federal authority was restricted to regulating private use in order to maintain a specific water level within the monument needed to protect a rare and endangered fish. *Id.* at 140-41. The reserved water rights were appropriately limited, in other words, to the water necessary to fulfill the specific purpose of the Devil's Hole reservation—preservation of the pool where the rare fish lived. Unlike here, the groundwater did not otherwise become public land subject to unfettered NPS control.

Finally, while this is currently a serious problem for Alaskans, it will spread soon enough. ANILCA's definition of "land" to include "lands, waters, and interests therein" is not unique. The identical definition appears in numerous federal land and park-enabling statutes within the Ninth Circuit. For example, the enabling statute for the Golden Gate National Recreation Area authorizes the Secretary of the Interior to "administer the lands, waters and interests therein acquired for the recreation area." 16 U.S.C. § 460bb-3(a). Likewise, the statute establishing Crater Lake National Park in Oregon provides that "[t]he boundary of the park shall encompass the lands, waters, and interests therein" within the area shown on the park map. 16 U.S.C. 121.[1] Under the Ninth Circuit's expansion

1. There are myriad examples. *See, e.g.*, 16 U.S.C. § 45f(b)(1) (Sequoia National Park); *id.* § 90 (North Cascades National Park); *id.* § 228b(a) (Grand Canyon National Park); *id.* § 410bb(b)(1) (Klondike Gold Rush National Historic Park); *id.* § 410ff-1(a) (Channel Islands National Park); *id.* § 410jj-3(c) (Kalaupapa National Historical Park); *id.* § 410mm-2(b) (Great Basin National Park); *id.* § 459c-7 (Point Reyes National Seashore); *id.* § 460q-2(a) (Whiskeytown-Shasta-Trinity National Recreation Area); *id.* § 460z-6(a) (Oregon Dunes National Recreation Area) *id.* § 460aa-

of the federal reserved water rights doctrine, the door is open under all of these statutes for the United States to claim reserved water rights as "interests therein" and seize control over the vast non-federal waters located throughout the West. For all these reasons, this important issue warrants the Court's review.

II. The Ninth Circuit's Ruling Conflicts with this Court's Decisions.

A. The Ninth Circuit indefensibly expanded the reserved waters rights doctrine.

ANILCA defines public land in terms of what the *federal government owns*—unless "title" to land is held by the United States, it is not "public land" under ANILCA. 16 U.S.C. § 3102(3). The Ninth Circuit nevertheless held that the federal government's interest in the Nation River by virtue of a "reserved water right" rendered this waterway and the land submerged beneath it "public land" within the meaning of ANILCA. App. 19a. That is incorrect for several reasons.

First, reserved water rights do not confer "title"—they confer a non-possessory use right. *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 ("Neither sovereign nor subject can acquire anything more than a mere usufructuary right" in the water itself.). NPS previously conceded as much. *See* Brief of Respondent at 27, *Sturgeon v. Frost*, No, 14-1209 (U.S. Dec. 16, 2015). Whatever "interest" a reserved water right creates, App. 12a, it neither creates nor approximates a title interest.

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12 (Sawtooth National Recreation Area); *id.* § 460kk(c)(1) (Santa Monica Mountains National Recreation Area).

Unlike mineral rights, for example, a reserved water right is not an alienable property "interest." Nor is it even an easement. Reserved water rights are a reservation of sovereign power that, like a navigational servitude, is not an interest that transfers title. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28 (1961) (servitude is "power of government to control and regulate navigable waters in the interest of commerce"); *City of Angoon*, 803 F.2d at 1027 n.6. In short, even if the United States held reserved water rights in all of Alaska's navigable waters for any purpose (which it does not), those rights still would not render the Nation River or any other navigable Alaska waterway "public land" under ANILCA.

Second, the assertion that the United States may take a title interest based on a reserved water right cannot overcome the clear statement rule. It is settled law that the United States may not invade the State's traditional authority over waters absent a clear statement of intent by Congress. After all, "Congress does not exercise lightly" the "extraordinary power" to "legislate in areas traditionally regulated by the States," *Gregory*, 501 U.S. at 460, and thus "does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-173 (2001). For that reason, this Court does not interpret a statute to "alter the 'usual constitutional balance between the States and the Federal Government'" unless Congress made "its intention to do so unmistakably clear in the language of the statute," *Gregory*, 501 U.S. at 460 (quotation omitted), that is "plain to anyone reading", *id.* at 467, through a "clear and manifest statement," *Rapanos v. United States*, 547 U.S. 715, 738 (2006).

ANILCA does not meet that standard. It makes no mention of navigable waters or reserved water rights, let alone explicitly allow NPS to assert jurisdiction over State waters. And its definition of "public lands" as "lands, waters, and interests therein" the "title to which is in the United States" does not clearly include navigable waters because Alaska owns the submerged lands below its navigable waters, and the United States does not hold title to the waters themselves. *Sturgeon*, 136 S. Ct. at 1067-69. Congress knows how to include a clear statement like this when it wishes to. *Compare, e.g.*, 16 U.S.C. §251n(a)(1) (Olympic National Park includes "all submerged lands and waters of Lake Ozette, Washington, and the Ozette River, Washington.").

Indeed, several provisions of ANILCA undermine the assertion of federal authority over Alaska's navigable waters. Congress excluded navigable waters from the definition of "public lands" by specifically exempting all "lands ... granted to the Territory of Alaska or the State under any other provision of Federal law." 16 U.S.C. § 3102(3)(A). This includes title to and ownership of the land underlying its navigable waters, which passed to Alaska under the Submerged Lands Act. *Totemoff v. State*, 905 P.2d 954, 964 (Alaska 1995) (citing 43 U.S.C. § 1311(a)). Non-public lands were then excluded from CSUs, as this Court held, and rendered off limits to park regulation through Section 103(c). *Sturgeon*, 136 S. Ct. at 1070-71. Section 1319, furthermore, provides that ANILCA shall not be construed "as expanding or diminishing Federal or State jurisdiction, responsibilities, interests, or rights in water resources, development, or control." 16 U.S.C. § 3207(2). If this law includes a clear statement, it is one that negates a federal claim of title to Alaska's waterways.

Title VIII of ANILCA eliminates any doubt. Unique among ANILCA's titles, Title VIII has its own preamble, which states that its purpose is to continue the goals of the Alaska Native Claims Settlement Act. 16 U.S.C. § 3111(4). It is likewise the only section where Congress invokes its Commerce Clause authority "to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents." *Id.* That Congress did not invoke its commerce powers anywhere else in the statute should be decisive here. If Congress had intended the statute to grant NPS ownership or regulatory rights beyond the narrow subsistence setting, ANILCA would not provide that "[n]othing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands *except as may be provided in [Title VIII] of this Act*, or to amend the Alaska constitution" and that "[e]xcept as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands." 16 U.S.C. § 3202(a)-(b) (emphasis added).[2] The Ninth Circuit's ruling deprives these provisions of force and effect.

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2. For these reasons, the Ninth Circuit's application of the reserved water rights doctrine in its *Katie John* subsistence decisions had at least some foothold in the statute. In granting review, then, the Court need not overturn or otherwise address the issue of subsistence management regulation in Alaska. Title VIII supports an array of subsistence management regulations that are beyond the scope of Mr. Sturgeon's challenge. The focus of Mr. Sturgeon's challenge is instead the Ninth Circuit's decision to expand the reasoning of the *Katie John* cases beyond subsistence and, in so doing, grant NPS plenary control over State waterways.

Third, the hovercraft ban exceeds the scope of whatever reserved water rights the United States might hold in the Nation River. The doctrine is premised on the need for actual use and withdrawal of water; it arises where Congress sets aside land for a federal purpose and that purpose would be "entirely defeated" without the reserved water. When the Court has inferred the existence of such a reservation, it therefore involved a specific need either to exclude others from appropriating water that feeds a federal land or to use a limited volume of water to serve federal land. *See, e.g., Cappaert*, 426 U.S. at 136-38; *Arizona v. California*, 373 U.S. 546, 596-99 (1963). No decision of this Court has held that reserved water rights grant the federal government plenary power over any body of water.

Yet the Ninth Circuit did so. Because protection of fish is one of ANILCA's purposes, according to the Ninth Circuit, any diminution of water within the Yukon-Charley "would necessarily impact this purpose, giving rise to a reserved water right." App. 18a. But under this Court's decisions, that determination would (at most) grant NPS the power to prevent others from appropriating and thus reducing water in a manner that endangers fish. It would not provide a basis for banning hovercraft from operating on waterways the United States does not own. NPS never even sought to establish that "the purposes of the [water] reservation would be entirely defeated" without the ban. *New Mexico*, 438 U.S. at 700. That is likely because there is neither any claim of water scarcity within ANILCA's CSUs, *Katie John III*, 720 F.3d at 1238, nor, in any event, an indication in ANILCA that its primary purposes would be defeated without a specified quantity of water.

In sum, cases like *Cappaert* set the outer limit on the authority the United States may assert under the reserved water rights doctrine. The ruling below exceeds those bounds. As the concurrence conceded, "[a] reserved water right is the right to a sufficient *volume* of water for use in an appropriate federal purpose," and "[t]his case has nothing to do with that." App. 20a.[3] Where reservation of water is not necessary to fulfill the federal purpose, the United States must acquire the waterway from the State—even if seizing control over it would be "beneficial in the administration and public use of the national parks and monuments." *New Mexico*, 438 U.S. at 702-03. Congress has wisely seen fit to appropriate NPS funds for just such purposes, *id.* (citing 16 U.S.C. § 17j-2 (1976)), and ANILCA authorizes NPS to purchase Alaskan lands, 16 U.S.C. § 3103(c); *id.* § 3192. Such statutory authorizations would be superfluous if Congress, as the Ninth Circuit concluded, had implicitly granted NPS plenary regulatory

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3. The concurrence would uphold the hovercraft ban directly under the Commerce Clause. App. 20a-23a (Nguyen, J., concurring). Congress does possess "significant authority to regulate activities" in navigable waters "by virtue of" its "dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power." *Alaska v. United States*, 545 U.S. 75, 116-17 (2005) (Scalia, J., concurring in part and dissenting in part). But that authority is for Congress to invoke. Federal agencies possess only the power Congress delegates to them. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445 (2014) In ANILCA, Congress invoked its Commerce Clause power only for purposes of authorizing subsistence regulation. The concurrence was therefore wrong to suggest that "ANILCA expressly left in place federal jurisdiction to regulate the navigable waters." App. 21a-22a. ANILCA did just the opposite—it cabined NPS control over non-federal navigable waters in Alaska and limited NPS commerce authority to subsistence.

authority over non-federal navigable waterways in Alaska based on reserved water rights.[4]

B. NPS's remaining alternative arguments are meritless.

In remanding this case, the Court noted that NPS had offered three alternative arguments in defense of the hovercraft ban. *Sturgeon*, 136 S. Ct. at 1072. The Ninth Circuit incorrectly seized on NPS's reserved water rights argument to affirm. But the other two arguments are no stronger and, if accepted, would be equally destructive of Alaska's sovereignty. Having remanded the case and given the Ninth Circuit the chance to pass on these arguments, the Court is now positioned to definitively resolve this important dispute.

First, NPS incorrectly argues that Section 100751(b) of its Organic Act authorizes the agency to ban hovercraft on the Nation River even if it is not public land. This Court has already held that ANILCA deprives NPS of authority over non-public Alaska land and water. This later specific statute trumps any general authority NPS may have been granted over navigable waters under its Organic Act. "[A] specific statute controls over a general one." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961).

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4. If anyone holds title, it is the State of Alaska. *California*, 436 U.S. at 40 ("the Submerged Lands Act transferred 'title to and ownership of' the submerged lands and waters.") (quoting 43 U.S.C. § 1311(a)). Because defeating the United States' title claim is sufficient to resolve this dispute, the Court need not reach this issue. But given its indisputable ownership of the land submerged beneath the Nation River, the State at a minimum has a *superior* title claim to the waters themselves.

Second, NPS incorrectly argues that even if Section 103(c) were applicable, the hovercraft ban would still be valid because it extends to both public lands and non-public lands within CSUs and therefore is not "applicable solely to public lands within such units." 16 U.S.C. § 3103(c); *see also Sturgeon*, 136 S. Ct. at 1072. The argument is circular and would render Section 103(c) meaningless.

Allowing NPS to indiscriminately manage public and non-public lands via the same regulations cannot be reconciled with Congress's conscious choice to differentiate between two crucially different categories of land. It also would allow NPS to dictate the extent of its own authority: the agency could regulate non-public Alaska land simply by extending the regulation to public land.[5] It defies logic, contravenes Congress's expressed intent, and overrides this Court's ruling to interpret Section 103(c) to somehow create a loophole under which NPS could evade any limit on its authority merely by extending a regulation to both federal and non-federal lands. NPS should not be allowed to nullify Section 103(c) by violating it.

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5. In passing, the Ninth Circuit may have endorsed this view by noting the requirement that NPS analyze private lands when creating CSU management plans. App. 8a (citing 16 U.S.C. § 3197(b)(7)). But this Section only instructs NPS to analyze how activity on private land impacts public land within CSUs and it focuses on forming cooperative agreements. ANILCA contains no authorization for NPS to regulate private land as public land. If NPS wants to regulate private land, it must acquire it. 16 U.S.C. § 3192.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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Date: January 2, 2018

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 2, 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Argued and Submitted October 25, 2016,
Seattle, Washington; Filed October 2, 2017,

No. 13-36165

JOHN STURGEON,

Plaintiff-Appellant,

v.

HERBERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE; GREG DUDGEON; ANDEE SEARS; RYAN ZINKE, SECRETARY OF THE INTERIOR; MICHAEL REYNOLDS, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE NATIONAL PARK SERVICE; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

Jerome Farris, Dorothy W. Nelson, and Jacqueline H. Nguyen, Circuit Judges.

Concurrence by Judge Nguyen.

Appendix A

OPINION

NGUYEN, Circuit Judge:

John Sturgeon would like to use his hovercraft in a national preserve to reach moose hunting grounds. The State of Alaska is fine with that;[1] the federal government is not. Sturgeon's case turns on which entity—state or federal—gets to decide the matter. On remand from the Supreme Court, we again conclude that the federal government properly exercised its authority to regulate hovercraft use on the rivers within conservation system units in Alaska.

I.

A.

The Yukon-Charley Rivers National Preserve conservation system unit ("Yukon-Charley") is among the 104 million acres of land in Alaska set aside for

1. The State of Alaska was previously a party to the litigation in the district court and in this court. In our prior opinion, we held that Alaska lacked standing, vacated the district court's judgment as to the State, and remanded with instructions to dismiss the State for lack of jurisdiction. *Sturgeon v. Masica*, 768 F.3d 1066, 1075 (9th Cir. 2014). Alaska did not seek Supreme Court review of that holding, and the district court amended its judgment to dismiss Alaska for lack of jurisdiction. That judgment being final, it is unaffected by the Supreme Court's vacatur of our prior opinion, *Sturgeon v. Frost*, 136 S. Ct. 1061, 194 L. Ed. 2d 108 (2016). We have considered Alaska's supplemental briefing along with that submitted by the other amici curiae and the remaining parties.

preservation purposes by the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3101 *et seq.* (1980). Like other conservation system units created by ANILCA, Yukon-Charley was drawn around a mix of federal, state, Native Corporation, and private owners.

Within the boundaries of the Yukon-Charley lies a stretch of the Nation River. Sturgeon would like to travel by hovercraft on this part of the river to get to moose hunting grounds located upstream from the preserve. Park Service regulations prohibit the use of hovercraft within "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System . . . without regard to the ownership of submerged lands, tidelands, or lowlands." 36 C.F.R. § 1.2(a)(3); *see id.* § 2.17(e). Alaska permits hovercraft on its waterways. Sturgeon contends that the Nation River belongs to Alaska and that the Park Service has no authority to regulate it. He seeks declaratory and injunctive relief preventing the Park Service from enforcing its hovercraft ban.

B.

ANILCA balanced the need to protect "the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska" with the need to provide "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). Thus, while ANILCA provided that conservation system units in Alaska generally "shall be administered . . . under the laws governing the administration of [National Park Service system unit]

lands," *id.* § 410hh, it "specified that the Park Service could not prohibit on those lands certain activities of particular importance to Alaskans." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1066, 194 L. Ed. 2d 108 (2016). For example, Park Service regulations applicable nationwide prohibit hunting and snowmobiling for the most part, *see* 36 C.F.R. §§ 2.2, 2.18, whereas ANILCA permits, subject to reasonable regulations, "the use of snowmachines . . . for travel to and from villages and homesites," 16 U.S.C. § 3170(a), and "the taking of . . . wildlife for sport purposes and subsistence uses," *id.* § 3201.

II.

"Section 103(c) of ANILCA . . . addresses the scope of the Park Service's authority over lands within the boundaries of conservation system units in Alaska." *Sturgeon*, 136 S. Ct. at 1067. It provides as follows:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. *No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.* If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any

> such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c) (emphasis added). The parties dispute the meaning of section 103(c) and in particular what it means to "be subject to the regulations applicable solely to public lands within such units."

The key to understanding section 103(c) is the difference between "Federal lands" and "public lands." ANILCA defines "public lands" as "land situated in Alaska which, after December 2, 1980, are Federal lands" except for land selected by the State of Alaska or a Native Corporation the title to which has not yet been conveyed. *Id.* § 3102(3). Similarly, "Federal land" is defined as "lands the title to which is in the United States after December 2, 1980." *Id.* § 3102(2). Simply put, Federal lands include land selections made by Alaska and Native Corporations but not yet transferred to them. Public lands do not. These land selections, while still formally belonging to the federal government, are not to be regulated as part of conservation system units.

The first sentence of section 103(c) establishes that the land selections by Alaska and Native Corporations are not "deemed to be included as a portion of such unit[s]" because that distinction belongs "[o]nly" to "public lands." Both the first and third sentences refer to public lands as being "a portion of" or "part of" the conservation system units in Alaska. This is distinct from lands that are merely "within such units," a phrase used in the second sentence as shorthand for lands "within the boundaries of" such

units but not necessarily a part of them. Land "within such units" includes public lands, the land selections, and non-federal lands. *See, e.g.*, Solid Waste Sites in Units of the National Park System, 59 Fed. Reg. 65,948, 65,949 (Dec. 22, 1994) ("[T]he phrase 'within the boundaries' is commonly employed to refer to both Federal land and nonfederally owned land or interests in land within the outer boundaries [of] a [National Park System] unit.").

The confusion in the second sentence stems from the awkward placement of "within such units." The phrase is not modified by "solely." *See Sturgeon*, 136 S. Ct. at 1070. Rather, it modifies "applicable." Thus, "regulations applicable solely to public lands within such units" means regulations applicable within such units solely to *public* lands—as opposed to *Federal* lands. In other words: regulations that apply only to lands that are deemed part of the units themselves. Outside Alaska, all federally owned lands within conservation system units are deemed part of the unit. *See* 54 U.S.C. § 100501. "Alaska is different." *Sturgeon*, 136 S. Ct. at 1070.

The import of the second sentence is that Federal lands within conservation system units that have been transferred to a non-federal party—like Federal lands that have been selected for state or tribal use—are not "subject to" regulations specific to the conservation system units.[2] Regulations applicable solely to public lands

2. We previously upheld as reasonable an agency determination that certain regulations specific to Alaska units applied to land selections as well as Federal lands. *See John v. United States* (*Katie John III*), 720 F.3d 1214, 1244-45 (9th Cir. 2013) (construing

include Park Service regulations applicable nationwide and Alaska-specific regulations found in ANILCA.[3] These contrast with regulations of general applicability, such as the Clean Air Act, that also affect non-public lands located within such units, such as the land selections and private lands.

Section 103(c) directly responds to the controversy that "Congress . . . stepped in to settle" when it enacted ANILCA. *Sturgeon*, 136 S. Ct. at 1066. Many Alaskans "were concerned that . . . new monuments [designated by President Carter] would be subject to restrictive federal regulations." *Id.* at 1065-66. By exempting Federal lands selected for state or tribal use from being regulated as a part of the unit, ANILCA serves one of its stated goals of providing "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d).

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36 C.F.R. § 242.4(2)). The basis for this holding was the apparently "inconsistent" directive in section 906(o)(2) of ANILCA: "Until conveyed, all Federal lands within the boundaries of a conservation system unit . . . shall be administered in accordance with the laws applicable to such unit." 43 U.S.C. § 1635(o)(2). Subsection (o), however, concerns land withdrawals—not land selections—and it expressly does not apply to those subsections of § 1635 pertaining to land selections. *See id.* § 1635(o)(1). Regardless, *Katie John III* acknowledged that "[s]ection 102 of ANILCA expressly excludes selected-but-not-yet-conveyed lands from the definition of 'public lands.'" *Katie John III*, 720 F.3d at 1243.

3. Of course, Park Service regulations applicable to conservation system units nationwide may be modified by Alaska-specific regulations. *See* 36 C.F.R. § 13.2(a).

Of course, regulation by the Park Service serves ANILCA's other goal of providing "sufficient protection for the national interest in the scenic, natural, cultural and environmental values." *Id.* But that goal is expressly limited to "public lands" in Alaska. *Id.* Land that is transferred to or selected for non-federal entities is generally not subject to the regulation of conservation system units. However, non-public land is still subject to such regulation if the United States retains an interest in it because the land is public to the extent of the interest.[4] That is clear from ANILCA's definition of "land" as "lands, waters, *and interests therein*." *Id.* § 3102(1) (emphasis added).

ANILCA recognizes that the federal government retains an interest in at least some otherwise non-public lands. It directs the Secretary of the Interior to "develop and transmit to . . . Congress a conservation and management plan for each of the units of the National Park System established or [expanded] by [ANILCA]." *Id.* § 3191(a). One component of the plan is a description of any privately-owned areas within the unit, their purposes, the actual or anticipated activities in the privately-owned areas, the effects of such activities on the unit, and "methods (such as cooperative agreements and *issuance or enforcement of regulations*) of controlling the use of such

4. The parties disagree about the Park Service's authority to regulate lands to and in which the United States has no title or interest by enacting regulations that apply to public and non-public land alike. We need not decide whether such a regulation would be enforceable on non-public land on the ground that it is not "applicable solely to public lands." 16 U.S.C. § 3103(c).

activities to carry out the policies of [ANILCA] and the purposes for which such unit is established or expanded." *Id.* § 3191(b)(7)(E) (emphasis added). Congress plainly expected that the Park Service could issue regulations governing conservation system units that would affect privately-owned lands.

III.

The hovercraft ban "do[es] not apply on non-federally owned lands and waters . . . located within National Park System boundaries," 36 C.F.R. § 1.2(b), except, as relevant here, on "[w]aters subject to the jurisdiction of the United States," *id.* § 1.2(a)(3), and on "[o]ther . . . waters over which the United States holds a less-than-fee interest, to the extent necessary to fulfill the purpose of the National Park Service administered interest and compatible with the nonfederal interest," *id.* § 1.2(a)(5). The question is whether the Nation River is subject to the jurisdiction or an interest of the United States such that it is public land that the Park Service is authorized to regulate.

A.

Before Alaska gained statehood, the Submerged Lands Act "release[d] and relinquishe[d] unto [the] States . . . all right, title, and interest of the United States" to "the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters." 43 U.S.C. § 1311(a)-(b). The Alaska Statehood Act secured these rights for Alaska. Pub. L. No. 85-508, § 6(m), 72 Stat. 343 (1958). In addition, Alaska

enjoys similar rights under the equal footing doctrine. *See United States v. Alaska*, 521 U.S. 1, 6, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997). While "the United States can prevent lands beneath navigable waters from passing to a State upon admission to the Union by reserving those lands in federal ownership" for "an appropriate public purpose," *id.* at 33-34; *see also* 43 U.S.C. § 1313(a) (excepting from the Submerged Lands Act "lands expressly retained by . . . the United States when the State entered the Union"), we have held that the Nation River was navigable at statehood and that Alaska took title to the riverbed at that time. *See Alaska v. United States*, 201 F.3d 1154, 1160, 1166 (9th Cir. 2000).

But lands submerged beneath inland waterways are distinct from the waterways themselves.[5] "Ownership [of submerged lands] may not be necessary for federal regulation of navigable waters . . . ." *Alaska*, 521 U.S.

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5. Sturgeon, suggesting otherwise, quotes the Supreme Court's statement that "the Submerged Lands Act transferred 'title to and ownership of' the submerged lands *and waters*." *United States v. California*, 436 U.S. 32, 40, 98 S. Ct. 1662, 56 L. Ed. 2d 94 (1978) (emphasis added) (quoting 43 U.S.C. § 1311(a)). We do not understand the Supreme Court to have breezily adopted an interpretation of the Submerged Lands Act at odds with the statute's plain meaning. In contrast to ANILCA, which includes "waters" within the definition of "lands," the Submerged Lands Act distinguishes "lands" from the various "waters" lying above them. 43 U.S.C. § 1301(a). *California* involved a dispute over the right to license kelp harvesting, *see* 436 U.S. at 35 n.8; neither "ownership of" nor rights to the waters was at issue. Presumably, the Court used "submerged lands and waters" to refer to submerged lands and water *resources*. *See* 43 U.S.C. § 1301(e) ("The term 'natural resources' includes . . . kelp . . . .").

at 42. Under the Submerged Lands Act, "[t]he United States retains all its navigational servitude and rights in and powers of regulation and control of [submerged] lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs." 43 U.S.C. § 1314(a).

We have held that the navigational servitude "is not 'public land' within the meaning of ANILCA" because "the United States does not hold title to the . . . servitude." *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986) (per curiam) (citing *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 627-28, 81 S. Ct. 784, 5 L. Ed. 2d 838 (1961)). We expanded that holding in *Alaska v. Babbitt* (*Katie John I*), deciding that Congress did not intend "to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters" when it enacted ANILCA. 72 F.3d 698, 703 (9th Cir. 1995).

Katie John I analyzed the United States' interest in navigable waters in Alaska under the reserved water rights doctrine. Under this doctrine, when the federal government "withdraws its land from the public domain and reserves it for a federal purpose," the government impliedly "reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976). The United States thus "acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators." *Id.*

Whether a federally reserved water right is implicit in a federal reservation of public land depends on whether the government intended to reserve unappropriated water. *Id.* at 139. "Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Id.*

In *Katie John I*, we concluded that "[t]he United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes," including ANILCA, and thereby has "implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations." 72 F.3d at 703 & n.10. This reservation of water rights gave the United States "interests in some navigable waters." *Id.* at 703. We held that ANILCA's "definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Id.* In *John v. United States* (*Katie John II*), we decided without discussion that *Katie John I*'s holding "should not be disturbed or altered." 247 F.3d 1032, 1033 (9th Cir. 2001) (en banc) (per curiam).

In *Katie John III*, we considered regulations implementing Title VIII of ANILCA pertaining to subsistence management on public lands, 36 C.F.R. pt. 242. These regulations "included within the definition of 'public lands'"—and thus applied to—"all navigable and non-navigable water within the outer boundaries of . . . 34 listed land units," including Yukon-Charley. *Katie John III*, 720 F.3d at 1232; *see* 36 C.F.R. § 242.3(c)(28). As

here, it was argued that State-and privately-owned lands located within a conservation s ystem unit, referred to as "inholdings," were not public lands and thus not subject to regulation. *Id.* at 1233.

We upheld the agency's inclusion of waters that lie on inholdings in the definition of public lands. *Id.* We reasoned that water rights impliedly acquired by the United States are not forfeited or conveyed to third parties along with the inholdings. *Id.* Because the water bodies were "actually situated within the boundaries of federal reservations," it was "reasonable to conclude that the United States ha[d] an interest in such waters for the primary purposes of the reservations." *Id.*

B.

We are bound under our *Katie John* precedent to reach a similar conclusion here. To begin with, ANILCA's definition of "public lands" applies throughout the statute. It would be anomalous if we treated the regulation at issue in *Katie John III* regarding the geographic scope of regulations implementing Title VIII, 36 C.F.R. § 242.3, as employing a different construction of "public lands" than applicable elsewhere in ANILCA. The regulation does not define "public lands." By merely referencing the term,[6]

6. The Title VIII regulations "apply on all public lands" within some conservation system units, *id.* § 242.3(b), but "exclud[e] marine waters" within others, *id.* § 242.3(c). Outside of the enumerated conservation system units, Title VIII regulations "apply on all other public lands, other than to the military, U.S. Coast Guard, and Federal Aviation Administration lands that are closed to access by the general public." *Id.* § 242.3(d).

which is defined globally in the statute, the regulation implies that there is but a single definition.

While *Katie John III* involved ANILCA's rural subsistence priority, that was only one of the purposes for which ANILCA reserved lands as conservation system units. *Katie John III* recognized that "water rights may be essential to a purpose of the reservation other than subsistence." 720 F.3d at 1240. Just as important was ANILCA's purpose of "provid[ing] sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska." 16 U.S.C. § 3101(d).

Three years before the statute's enactment, President Carter withdrew and reserved the land for Yukon-Charley "for the protection of . . . historical, archeological, biological, [and] geological . . . phenomena" including habitat for "isolated wild populations of Dall sheep, moose, bear, wolf, and other large mammals." Proclamation No. 4626, 43 Fed. Reg. 57,113 (Dec. 5, 1978). In particular, he "reserved all water necessary to the proper care and management of those objects protected by [Yukon-Charley] and for [Yukon-Charley's] proper administration." *Id.* at 57,114. In that vein, Congress specified in section 201 of ANILCA that Yukon-Charley "shall be managed for the following purposes, among others":

> To maintain the environmental integrity of the entire Charley River basin, including streams, lakes and other natural features, *in its undeveloped natural condition* for public

> benefit and scientific study; to protect habitat for, and populations of, fish and wildlife, including but not limited to the peregrine falcons and other raptorial birds, caribou, moose, Dall sheep, grizzly bears, and wolves . . . .

16 U.S.C. § 410hh(10) (emphasis added).

Consistent with this intent, Congress has authorized the Secretary of the Interior to "prescribe regulations . . . concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States." 54 U.S.C. § 100751(b). The Park Service's hovercraft ban, applicable to federally managed conservation areas nationwide, "was adopted pursuant to [§] 100751(b)." *Sturgeon*, 136 S. Ct. at 1067. To be more precise, the hovercraft ban was adopted pursuant to § 100751(b)'s statutory predecessor, which similarly provided the Secretary of the Interior with the authority to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." 16 U.S.C. § 1a-2(h) (1982).[7] This earlier version was enacted four years before ANILCA. Act to Amend

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7. The hovercraft ban was implemented in 1983. *See* General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252, 30,258 (June 30, 1983). Section 100751(b) took effect in 2014 when Congress added Title 54 to consolidate "provisions relating to the National Park Service and related programs" in "one distinct place." H.R. Rep. No. 113-44, at 2 (2013).

the Administration of the National Park System, Pub. L. No. 94-458, 90 Stat. 1939 (1976). ANILCA specified that it did not in any way affect "any law governing appropriation or use of, or Federal right to, water on lands within the State of Alaska," and did not supersede, modify, or repeal "existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto." 16 U.S.C. § 3207(1), (3).

The hovercraft ban is also consistent with Congressional intent. Hovercraft were prohibited "because they provide virtually unlimited access to park areas and introduce a mechanical mode of transportation into locations where the intrusion of motorized equipment by sight or sound is generally inappropriate." General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252, 30,258 (June 30, 1983). The hovercraft ban thus serves the purpose of keeping waterways in their "undeveloped natural condition . . . to protect [wildlife] habitat." 16 U.S.C. § 410hh(10).

C.

Sturgeon argues that "[r]eserved water rights are not a 'title' interest." While that is true in a narrow, technical sense, *see Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10, 74 S. Ct. 487, 98 L. Ed. 666 (1954) ("Neither sovereign nor subject can acquire anything more than a mere usufructuary right [in the water itself] . . . ."), by the same logic the State also lacks

a "title" interest in the waters above its riverbeds. Water cannot be owned, *see, e.g.*, 2 Amy K. Kelley, *Waters and Water Rights* § 36.02 (3d ed. 2017) (observing the Supreme Court's impatience "with claims of absolute 'ownership' by *either* [state or federal] government"), but "the right of [water's] use, as it flows along in a body, may become a property right." *Niagara Mohawk Power Corp.*, 347 U.S. at 247 n.10.

The word "title" has many meanings. Equitable title, for example, is a beneficial interest in property. *See, e.g., R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1067 n.6 (9th Cir. 1997) (using the phrases "vested interest" and "equitable title" interchangeably). Thus, "title" to an "interest" in water almost certainly means a vested interest in the water, such as a reserved water right. But even if we were uncertain, *Katie John I* already decided the matter when it held that ANILCA's "definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." 72 F.3d at 704. That could not be so unless title to an interest in Alaska's navigable waters is in the United States. *See* 16 U.S.C. § 3102(1)-(3).

Sturgeon also argues that "[t]he reserved water rights doctrine is premised on the need for actual use and withdrawal of water" and that the Park Service has shown no need for a specific quantity of water because the water in conservation system units is not scarce. *Katie John III* forecloses that argument. There was similarly "no suggestion that any federal reservation along any Alaskan waters risks being turned into a 'barren waste'

. . . , or a substantially diminished pool . . . , or is in any way short of water." 720 F.3d at 1238. For that reason, in determining the geographic scope of the United States' reserved water rights, *Katie John III* "include[d] . . . all the bodies of water on which the United States' reserved rights *could at some point* be enforced—*i.e.*, those waters that are or *may become necessary* to fulfill the primary purposes of the federal reservation at issue." *Id.* at 1231 (emphasis added). Here, one of the reservation's primary purposes is to protect fish. The diminution of water in any of the navigable waters within Yukon-Charley's boundaries would necessarily impact this purpose, giving rise to a reserved water right.

Sturgeon points out that some 18 million acres within ANILCA-established conservation system units, approximately one-sixth of the total, are land selections for Native Corporations. He worries that federal regulation of navigable waters within the units will result in "economic catastrophe" to native shareholders by "impeding any efforts . . . to productively utilize their lands." Even if true, that is not at issue in this case. Sturgeon lacks standing to assert hypothetical claims on the Native Corporations' behalf. In any event, "Congress clearly did not state in ANILCA that subsistence uses are always more important than . . . other uses of federal lands; rather, it expressly declared that preservation of subsistence resources is *a* public interest and established a framework for reconciliation, where possible, of competing public interests." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545-46, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987). Should Sturgeon's concerns materialize, they can be resolved in an appropriate case.

Appendix A

IV.

ANILCA section 103(c) does not limit the Park Service from applying the hovercraft ban on the Nation River in Yukon-Charley because, under our *Katie John* precedent, the United States has an implied reservation of water rights, rendering the river public lands. Therefore, the district court's order granting summary judgment to defendants is

AFFIRMED.

Appendix A

CONCUR

NGUYEN, Circuit Judge, with whom Circuit Judge NELSON joins, concurring:

We are bound by our *Katie John* decisions to analyze this case under the reserved water doctrine. That is unfortunate. A reserved water right is the right to a sufficient *volume* of water for use in an appropriate federal purpose. *See John v. United States* (*Katie John III*), 720 F.3d 1214, 1226 (9th Cir. 2013) ("[A]pplications of the federal reserved water rights doctrine have focused on the amount of water needed for a specific federal reservation, rather than the locations of water sources that might generally be needed . . . ."). This case has nothing to do with that. Rather, it is about the right to regulate navigation on navigable waters within an Alaska national preserve. That is a Commerce Clause interest and should be analyzed as such.

Alaska v. Babbitt (*Katie John I*), 72 F.3d 698 (9th Cir. 1995), expressed two concerns with analyzing regulatory issues under the navigational servitude or, more generally, the Commerce Clause. One concern was that by treating the federal government's power to regulate under the Commerce Clause as an interest in water, we render ANILCA's definition of Federal lands meaningless because the United States cannot have "title to" such an interest. 72 F.3d at 704. But that is no less true of the United States' ability to have "title to" a reserved water right. *See John v. United States* (*Katie John II*), 247 F.3d 1032, 1047 (9th Cir. 2001) (Kozinski, J., dissenting) ("[A] usufructuary

right does not give the United States *title* to the waters or the lands beneath those waters."). And treating either interest—a navigational servitude or a reserved water right—as a property interest to which the United States holds title is a reasonable interpretation of the statute. The Supreme Court has referred to navigable waters as "the public property of the nation" insofar as "[t]he power to regulate commerce comprehends [federal] control for that purpose, and to the extent necessary." *United States v. Rands*, 389 U.S. 121, 123, 88 S. Ct. 265, 19 L. Ed. 2d 329 (1967) (quoting *Gilman v. City of Philadelphia*, 70 U.S. 713, 724-25, 18 L. Ed. 96 (1865)).

Katie John I's textual concern misses a larger point: even if the federal interest in navigable waters under the Commerce Clause is not a property right at all, it is a power "paramount to . . . proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources [of] the respective States." 43 U.S.C. § 1314(a); *see also New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6, 102 S. Ct. 1096, 71 L. Ed. 2d 188 (1982) ("Whatever the extent of the State's proprietary interest in the river, the pre-eminent authority to regulate . . . resides with the Federal Government."). The proper exercise of the Commerce Clause power is "not an invasion of any private property rights in the stream or the lands underlying it." *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 708, 107 S. Ct. 1487, 94 L. Ed. 2d 704 (1987) (quoting *Rands*, 389 U.S. at 123). Thus, whether the navigational servitude is "public land" or not is irrelevant. ANILCA expressly left in place federal jurisdiction to regulate the

navigable waters. *See* 16 U.S.C. § 3207 ("Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or . . . as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control . . . .").

Katie John I's other concern was that reliance on the Commerce Clause would allow "a complete assertion of federal control" over "all [navigable] waters in Alaska." 72 F.3d at 704. But the United States' power to regulate activity within the sphere of federal interests on navigable waters is not an exclusive right. States may regulate their waterways to the extent their regulations do not conflict with federal ones. *See Barber v. Hawaii*, 42 F.3d 1185, 1191 (9th Cir. 1994) ("The purpose of [the Submerged Lands Act] was not for the Federal Government to retain exclusive jurisdiction over navigation of the waters above the submerged lands, but for the Federal Government to retain concurrent jurisdiction over those waters."); *see also Courtney v. Goltz*, 736 F.3d 1152, 1160 (9th Cir. 2013) (holding that states may regulate business franchises on navigable waters so long as they do not "encroach on the federal commerce power").

Although *Katie John I* purported to eschew the Commerce Clause as a source of federal regulatory power, it conceded that the reserved water rights doctrine originates in part in the Commerce Clause. 72 F.3d at 703 (citing *Cappaert v. United States*, 426 U.S. 128, 138, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976)). In fact, the doctrine arises solely from the Commerce Clause insofar as

Alaska's navigable waters are concerned. The doctrine's other source, the Property Clause, merely "permits federal regulation of federal lands." *Cappaert*, 426 U.S. at 138 (citing U.S. Const. art. IV, § 3). Alaska's navigable waters are not federal lands in the usual (non-ANILCA) sense because the riverbeds by default now belong to Alaska. It is the Commerce Clause that "permits federal regulation of navigable streams" regardless of who owns the land beneath. *Id.* (citing U.S. Const. art. I, § 8).

Katie John I described its own holding as "inherently unsatisfactory." 72 F.3d at 704. We have since criticized it as a "problematic solution to a complex problem, in that it sanctioned the use of a doctrine ill-fitted to determining which Alaskan waters are 'public lands.'" *Katie John III*, 720 F.3d at 1245. I could not agree more.

I would adopt the well-reasoned approach set forth in Judge Tallman's concurrence to *Katie John II*. Rather than continuing to shove a square peg into a hole we acknowledge is round, we should embrace a Commerce Clause rationale for federal regulation of Alaska's navigable waters.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 16, 2014

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-36165

JOHN STURGEON,

Plaintiff-Appellant,

STATE OF ALASKA,

Plaintiff-Intervenor,

v.

SUE MASICA, in her official capacity as Alaska Regional Director of the National Park Service; GREG DUDGEON; ANDEE SEARS; SALLY JEWELL, Secretary of the Interior; JONATHAN JARVIS, in his official capacity as Director of the National Park Service; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

D.C. No. 3:11-cv-00183-HRH
District of Alaska,
Anchorage

Appendix B

ORDER

Before: FARRIS, D.W. NELSON, and NGUYEN, Circuit Judges.

Judge Farris, Nelson, and Nguyen have voted to deny the petitions for panel rehearing filed by Plaintiff-Appellant John Sturgeon and Plaintiff-Intervenor State of Alaska. Judge Nguyen has voted to deny the petitions for rehearing *en banc* filed by Sturgeon and the State of Alaska, and Judges Farris and Nelson so recommend.

The full court has been advised of the petitions, and no judge of the court has requested a vote on the petitions for rehearing *en banc*. Fed. R. App. P. 35.

The petitions for rehearing and rehearing *en banc* are DENIED.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 6, 2014

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-36165

D.C. No. 3:11-cv-00183-HRH

JOHN STURGEON,

Plaintiff-Appellant,

STATE OF ALASKA,

Plaintiff-Intervenor,

v.

SUE MASICA, in her official capacity as Alaska Regional Director of the National Park Service; GREG DUDGEON; ANDEE SEARS; SALLY JEWELL, Secretary of the Interior; JONATHAN JARVIS, in his official capacity as Director of the National Park Service; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

Appendix C

No. 13-36166

D.C. No. 3:11-cv-00183-HRH

STATE OF ALASKA,

Intervenor-Plaintiff-Appellant,

and

JOHN STURGEON,

Plaintiff,

v.

SUE MASICA, in her official capacity as Alaska Regional Director of the National Park Service; GREG DUDGEON; ANDEE SEARS; SALLY JEWELL, Secretary of the Interior; JONATHAN JARVIS, in his official capacity as Director of the National Park Service; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Senior District Judge, Presiding

August 12, 2014, Argued and Submitted,
Anchorage, Alaska

Appendix C

October 6, 2014, Filed

Before: Jerome Farris, Dorothy W. Nelson, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Nguyen

SUMMARY*

Standing / National Park Service

The panel affirmed the district court's summary judgment in favor of federal appellees, and vacated the judgment against intervenor/appellant State of Alaska, due to its lack of standing, in an action brought by John Sturgeon challenging the National Park Service's enforcement of a regulation banning the operation of hovercrafts on the Nation River.

Tha National Park Service ("NPS") ban prevented Sturgeon from using his personal hovercraft on his moose hunting trips on the Nation River, part of which falls within the Yukon-Charley Rivers National Preserve. The State of Alaska intervened, challenging NPS's authority to require its researchers to obtain a permit before engaging in studies of chum and sockeye salmon on the Alagnak River, part of which falls within the boundaries of the Katmai National Park and Preserve.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that Sturgeon established Article III standing. The panel also held that the federal appellees waived their prudential standing arguments. The panel further held that the State of Alaska lacked standing to challenge the NPS regulations. The panel vacated the district court's judgment as to Alaska, and remanded with instructions that Alaska's case be dismissed for lack of jurisdiction.

The panel rejected Sturgeon's contention that § 103(c) of the Alaska National Interest Lands Conservation Act precluded NPS from regulating activities on state-owned lands and navigable waters that fell within the boundaries of National Park System units in Alaska. The panel held that Sturgeon's interpretation of § 103(c) was foreclosed by the plain text of the statute. The panel held that even assuming that the waters of and lands beneath the Nation River had been "conveyed to the State" for purposes of the Alaska National Interest Lands Conservation Act § 103(c), NPS's hovercraft ban was not a regulation that applied solely to public lands within conservation system units in Alaska; and given its general applicability, the regulation could be enforced on both public and nonpublic lands alike within conservation system units.

The panel also rejected Sturgeon's arguments that the Secretary of the Interior exceeded her statutory authority in promulgating the regulation at issue, and that her action raised serious constitutional concerns.

Appendix C

OPINION

NGUYEN, Circuit Judge:

John Sturgeon ("Sturgeon") challenges the National Park Service's ("NPS") enforcement of a regulation banning the operation of hovercrafts on the Nation River, part of which falls within the Yukon-Charley Rivers National Preserve. The ban prevented Sturgeon from using his personal hovercraft on his moose hunting trips on the Nation River. The State of Alaska intervened, challenging NPS's authority to require its researchers to obtain a permit before engaging in studies of chum and sockeye salmon on the Alagnak River, part of which falls within the boundaries of the Katmai National Park and Preserve.

Sturgeon and Alaska present the same legal argument: § 103(c) of the Alaska National Interest Lands Conservation Act ("ANILCA") precludes NPS from regulating activities on state-owned lands and navigable waters that fall within the boundaries of National Park System units in Alaska. The district court granted summary judgment in favor of the federal appellees. Because we find that Sturgeon's interpretation of § 103(c) is foreclosed by the plain text of the statute, we affirm as to Sturgeon. We hold that Alaska lacks standing to bring this challenge, and thus vacate and remand with instructions that Alaska's case be dismissed.

Appendix C

I.

The facts are straightforward and largely undisputed. Since 1971, Sturgeon has hunted moose on an annual basis on the Nation River.[1] The lower six miles of the Nation River lie within the Yukon-Charley Rivers National Preserve ("Yukon-Charley"), which is a unit of the National Park System. In 1990, Sturgeon purchased a small, personal hovercraft, which he used on his hunting excursions. In September 2007, while repairing his hovercraft on a gravel bar adjoining the river, Sturgeon was approached by three NPS law enforcement employees. They informed him that NPS regulations prohibited the operation of hovercrafts within the Yukon-Charley and issued him a verbal warning. Sturgeon protested that the NPS regulations were inapplicable because he was operating his hovercraft on a state-owned navigable river. Sturgeon contacted his attorney via satellite phone, who in turn contacted Andee Sears, a Regional Law Enforcement Specialist with NPS. Sears told Sturgeon's attorney that the hovercraft must be removed from the Yukon-Charley. Sturgeon complied.

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1. The Nation River is a tributary of the Yukon River. While Sturgeon's complaint also mentions his hunting excursions on the Yukon River, part of which also falls within the Yukon-Charley Rivers National Preserve, he failed to raise a separate claim for the Yukon River. Thus, the district court found that only the applicability of the regulation to the Nation River was before the court. *Sturgeon v. Masica*, No. 3:11-CV-0183-HRH, 2013 U.S. Dist. LEXIS 157078, 2013 WL 5888230, at *6 (D. Alaska Oct. 30, 2013). Sturgeon does not challenge that finding on appeal.

Later, Sturgeon followed up with Sears over the phone and met with him in Anchorage. Sears advised Sturgeon that even though Alaska might own the submerged land beneath the river, the hovercraft ban was nonetheless in force within the boundaries of the Yukon-Charley. Sears warned Sturgeon that he risked criminal liability if he operated his hovercraft within the Yukon-Charley. In response to these warnings, Sturgeon refrained from using his hovercraft during the 2008 to 2010 moose hunting seasons and has not been able to hunt on the portions of the Nation River that fall within the boundaries of the Yukon-Charley.

Although Sturgeon sent a letter to then-Secretary of the Interior, Ken Salazar, petitioning for repeal or amendment of the NPS regulations restricting his access to navigable waters located within national park boundaries, he did not receive a response. He then sued in federal district court, seeking an order declaring that NPS's regulations violated ANILCA, as applied to him on state-owned lands and waters, and enjoining the federal defendants from enforcing these regulations.

Alaska intervened, raising the same argument that the application and enforcement of NPS regulations on state-owned lands and waters violated ANILCA. Specifically, Alaska challenged NPS regulations that required employees of the Alaska Department of Fish and Game to obtain a scientific research and collecting permit before engaging in genetic sampling of chum and sockeye salmon on the Alagnak River. These regulations purportedly harmed Alaska "in the form of increased

staff time and expense in complying with NPS procedures and in the form of delays in implementing the project." Alaska further argued that NPS's actions both interfered with its sovereign right to manage and regulate its lands and waters and chilled its citizens' ability to enjoy the rights and benefits flowing from its management of state resources.

On summary judgment, the district court ruled in favor of the federal appellees. *Sturgeon v. Masica*, No. 3:11-CV-0183-HRH, 2013 U.S. Dist. LEXIS 157078, 2013 WL 5888230, at *9 (D. Alaska Oct. 30, 2013). The district court found that Sturgeon's and Alaska's interpretation of ANILCA § 103(c) lacks support in the plain language of the statute. 2013 U.S. Dist. LEXIS 157078, [WL] at *8-*9. This appeal followed.

II.

We review questions of law resolved on summary judgment de novo, and the district court's factual findings for clear error. *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 976 (9th Cir. 2012).

III.

As an initial matter, the federal appellees contend that we lack jurisdiction over this appeal because Sturgeon and Alaska have failed to establish standing. Even though the federal appellees did not present these arguments to the district court below, they may nonetheless do so for the first time on appeal. The constitutional requirements for

standing under Article III are jurisdictional, cannot be waived by any party, and may be considered sua sponte. *City of Los Angeles v. Cnty. of Kern*, 581 F.3d 841, 845 (9th Cir. 2009). The oft-repeated "irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "First, the plaintiff must have suffered an 'injury in fact,'" which is both concrete and particularized, as well as actual or imminent. *Id.* "Second, there must be a causal connection between the injury and the conduct complained of," meaning that the injury must be "fairly traceable to the challenged action of the defendant." *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (quotation mark and alterations omitted)). Third, it must be likely that a favorable decision would redress the injury identified. *Id.* at 561.

Apart from these constitutional concerns, "there exists a body of 'judicially self-imposed limits on the exercise of federal jurisdiction'" that forms the prudential standing doctrine. *Cnty. of Kern*, 581 F.3d at 845 (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)); *see also Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289-90, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008). Because these considerations are nonconstitutional in nature, they may be deemed waived if not previously raised before the district court. *Cnty. of Kern*, 581 F.3d at 845.

Appendix C

A.

We find that Sturgeon has established standing. The federal appellees argue that Sturgeon has failed to show probable or imminent enforcement of the NPS regulations to meet the first requirement of an injury-in-fact. The federal appellees' view, however, cannot be reconciled with the Supreme Court's recent decision in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014), where the Court emphasized that *threatened* enforcement actions may suffice to create Article III injuries. "When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Id.* at 2342. Thus, "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* (quoting *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)).

Sturgeon has satisfied the injury-in-fact requirement. He has alleged an intention to use his hovercraft, and has contacted both NPS and the Department of the Interior regarding the applicability and enforcement of the regulation to his hovercraft use. Sturgeon's inability to use his hovercraft for moose-hunting purposes arguably implicates his right under the Privileges or Immunities Clause of the Fourteenth Amendment "to use the navigable waters of the United States, however they may penetrate the territory of the several States."

The Slaughter-House Cases, 83 U.S. 36, 79, 21 L. Ed. 394 (1872); *see also Courtney v. Goltz*, 736 F.3d 1152, 1160 (9th Cir. 2013) (interpreting the Privileges or Immunities Clause to encompass "a right to *navigate* the navigable waters of the United States"). Sturgeon thus alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298).

Further, there is no dispute that his intended conduct is proscribed by NPS regulation. *See* 36 C.F.R. § 2.17(e) (stating that "[t]he operation or use of hovercraft is prohibited" within NPS-administered lands and waters, which include the Yukon-Charley). Finally, "there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298). The federal appellees concede that Sturgeon received a verbal warning not to use the hovercraft, that Special Agent Sears told Sturgeon's lawyer that Sturgeon "should remove the hovercraft from the preserve," and that Sears later indicated that Sturgeon "[might] be subject to criminal liability if he operated a hovercraft in the preserve."[2] These facts are sufficient to show a credible threat of enforcement against Sturgeon.

Next, the federal appellees argue that any injury-in-fact identified by Sturgeon is not "fairly traceable" to actions of NPS. We disagree. The regulation was promulgated by NPS and enforcement has been

2. Indeed, if Sturgeon violated NPS's hovercraft ban, he would risk incurring a fine and imprisonment for up to six months. *See* 36 C.F.R. § 1.3(a).

threatened by NPS employees. Therefore, Sturgeon's injuries are "fairly traceable" to actions of NPS. Finally, a favorable decision would redress Sturgeon's identified injury-in-fact, and the federal appellees do not contend otherwise.

In addition to contending that Sturgeon lacks Article III standing, the federal appellees argue that prudential considerations of ripeness and adverseness militate against a finding of standing. However, the federal appellees failed to raise these arguments before the district court. We thus find them waived, as prudential standing arguments "can be deemed waived if not raised in the district court" due to their nonconstitutional nature.[3] *Cnty. of Kern*, 581 F.3d at 845 (quoting *Bd. of Natural Res. v. Brown*, 992 F.2d 937, 946 (9th Cir. 1993)) (internal quotation marks omitted).

B.

The State of Alaska, on the other hand, lacks standing. Alaska offers three bases to support its standing: (1) harm "in the form of increased staff time and expense" in obtaining and complying with the terms of a scientific research and collecting permit; (2) injuries to Alaska's sovereign right to control its lands and waters; and (3) the Secretary of the Interior's denial of its petition for

3. Moreover, it may be that the "Article III standing and ripeness issues in this case 'boil down to the same question'"—namely, whether a sufficient injury-in-fact exists to render the case ripe. *Susan B. Anthony List*, 134 S. Ct. at 2341 n.5 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)).

administrative proceedings that would repeal or amend the regulations at issue. We address each of the proffered bases in turn.

With regard to Alaska's chum and sockeye salmon study, the increased burdens to Alaska as a result of NPS's permit requirement clearly constitute injuries-in-fact. It is undisputed that NPS employees informed Alaska's Department of Fish and Game ("DFG") that a scientific research and collecting permit was required before it engaged in the study. The scientific research and collecting permit that DFG actually obtained and the General Conditions and Park Specific Guidance that accompanied it—all of which are part of the record—demonstrate that DFG was forced to comply with numerous obligations and limitations under the terms of the permit. To name just a few, DFG was not allowed to destroy research specimens without NPS's prior authorization, was obligated to catalogue collected specimens into NPS's Interior Collections Management System and label such specimens with NPS accession and catalog numbers, and was required to submit an Investigator's Annual Report and copies of other final reports and publications resulting from the study within a year of publication. The record thus amply supports Alaska's allegation of harm in the form of increased staff time and expense.

But while Alaska may have suffered cognizable injuries, a favorable ruling would not redress these injuries. Alaska's complaint sought a declaration that the NPS regulations were invalid and void as applied to state-owned lands and waters and an injunction barring future

enforcement of the regulations on state-owned lands and waters. Such relief would not remedy injuries relating to DFG's chum and sockeye salmon study in 2010, which have already been incurred and suffered. At oral argument, Alaska represented that DFG's chum and sockeye salmon study is complete, and the record offers no indication that related studies or efforts are pending or forthcoming. In the absence of evidence showing how the requested relief would redress its identified injuries, Alaska may not rely on activities relating to the 2010 study of chum and sockeye salmon to establish standing. *Cf. Lujan*, 504 U.S. at 564 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." (alteration in original) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)) (internal quotation marks omitted).

The second basis proffered by Alaska presents a closer question. Alaska argues that the NPS regulations violate its "sovereign[] " and "proprietary interests" in its lands and waters, and interfere with its "authority and ability to manage its property in accordance with the Alaska Constitution and state law." States certainly possess sovereign and proprietary interests that may be pursued via litigation. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601-02, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982); *see also, Pennsylvania v. New Jersey*, 426 U.S. 660, 665, 96 S. Ct. 2333, 49 L. Ed. 2d 124 (1976) ("It has . . . become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated . . . ."). However, we conclude

that Alaska's arguments are unavailing for purposes of establishing standing under the circumstances of this case.

To begin with, Alaska failed to meet the requirement that its purported injuries be "actual or imminent." *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)) (internal quotation mark omitted). Because Alaska did not identify any actual conflict between NPS's regulations and its own statutes and regulations, we are left with only a vague idea of how exactly NPS's permitting requirement infringes on the state's sovereign and proprietary interests in its lands and waters, or how the requirement interferes with the state's control over and management of those lands and waters. In the absence of such a conflict, Alaska's purported injuries are too "conjectural or hypothetical" to constitute injuries-in-fact. *Id.* (quoting *Whitmore*, 495 U.S. at 155) (internal quotation marks omitted).

Alaska has cited no case that finds standing based simply on purported violations of a state's sovereign rights. Rather, evidence of actual injury is still required. For example, in *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007), the Supreme Court found that Massachusetts had standing to challenge the EPA's denial of a rulemaking petition requesting regulation of greenhouse gas emissions under the Clean Air Act. *Id.* at 510-11, 526. The Court noted that the state was due "special solicitude in [the] standing analysis" based on two factors: (1) Massachusetts sought to vindicate a procedural right, which eliminated the need under Article

III to demonstrate redressability and immediacy, and (2) Massachusetts's status as a "sovereign State." *Id.* at 517-20; *see also Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1144-45 (9th Cir. 2013) (distinguishing *Massachusetts v. EPA*). Even in light of this special solicitude, however, the Court specifically found that "[b]ecause the Commonwealth 'own[ed] a substantial portion of the state's coastal property,' it ha[d] alleged a particularized injury in its capacity as a landowner" due to rising global sea levels. *Massachusetts*, 549 U.S. at 522 (citation omitted).

Similarly, in *Oregon v. Legal Services Corp.*, 552 F.3d 965 (9th Cir. 2009), Oregon contended that a private, nonprofit corporation established by the United States to provide federal funds to local legal assistance programs "thwart[ed] [its] efforts at policy making with regards to Oregon's Legal Service Program." *Id.* at 973. We rejected Oregon's claim because "there [was] no dispute over Oregon's ability to regulate its legal services program, and no claim that Oregon's laws ha[d] been invalidated as a result of the [corporation's] restrictions." *Id.* Because Oregon was able "to regulate its legal service programs as it desire[d]," there was thus "no judicially cognizable injury." *Id.* at 974.

Finally, *Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990), is also illustrative. Nevada challenged the Bureau of Land Management's decision to grant a right-of-way over state-owned land to the Department of Energy. *Id.* at 855. Because Nevada's complaint was "silent as to how [the Bureau's] alleged violations . . . resulted in injury to Nevada," in the absence of demonstrated injury, its claim

"'constitute[d] a generalized grievance that the [Bureau] [was] not acting in . . . accordance' with federal laws" and was thus "insufficient to demonstrate standing." *Id.* at 856-57 (first, third, and fourth alterations added, second alteration in original) (quoting *Nevada v. Burford*, 708 F. Supp. 289, 295 (D. Nev. 1989)). *See also Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 883 (9th Cir. 2001) (finding no injury-in-fact where twenty Native American tribes challenged a Master Settlement Agreement between Philip Morris, Inc. and forty-six states, five territories, and the District of Columbia because the tribes identified no tribal regulations or contracts that would be affected by the Agreement).

Similarly, here, Alaska's claims regarding its sovereign and proprietary interests lack grounding in a demonstrated injury. While Alaska alleges that NPS regulations "have directly interfered with Alaska's ability as a sovereign to manage and regulate its land and waters," Alaska identifies no conflict between NPS regulations and its own state statutes and regulations.[4]

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4. Alaska also alleges that the NPS regulations have had "a chilling effect" on Alaskans' use and enjoyment of state-owned lands and waters. But "a state does not have standing 'to protect her citizens from the operation of federal statutes.'" *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971 (9th Cir. 2009) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)). And "the State must articulate an interest apart from the interests of particular private parties." *Id.* (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)) (internal quotation mark omitted). Alaska has failed to do so.

Any injury to Alaska's sovereign and proprietary interest is pure conjecture and thus insufficient to establish standing.

The third and final basis upon which Alaska relies to establish standing is the Secretary of the Interior's denial of its petition for new administrative proceedings. A plaintiff possesses standing to enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Lujan*, 504 U.S. at 573 n.8. As discussed above, Alaska fails to identify any "threatened concrete interest." Alaska cannot rely on the Secretary's denial of its petition because "[p]articipation in agency proceedings is alone insufficient to satisfy judicial standing requirements." *Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 433, 351 U.S. App. D.C. 344 (D.C. Cir. 2002) (quoting *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 27, 349 U.S. App. D.C. 347 (D.C. Cir. 2002)) (internal quotation marks omitted). Alaska's "right to petition the agency does not in turn 'automatic[ally]' confer Article III standing when that right is deprived." *Id.* (alteration in original) (quoting Pet'rs' Br.).

Therefore, we hold that Alaska has failed to establish standing to challenge the NPS regulations. We vacate the district court's judgment as to Alaska and remand with instructions that Alaska's case be dismissed for lack of jurisdiction.

Appendix C

IV.

We now turn to the merits of Sturgeon's challenge. Sturgeon contends that § 103(c) of ANILCA bars the application and enforcement of NPS's hovercraft ban on the Nation River,[5] which he contends is state-owned land. According to Sturgeon, the plain text of the statute, its legislative history, and our decision in *City of Angoon v. Marsh*, 749 F.2d 1413 (9th Cir. 1984), support his view. Before explaining why we find Sturgeon's contentions unpersuasive, we offer a bit of background.

A.

ANILCA, enacted in 1980, offered new "protection[s] for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provide[d] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). Summarized succinctly, "ANILCA is generally concerned with the designation, disposition, and management of land for environmental preservation purposes." *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1165 (9th Cir. 2008). To this end, Congress "set aside approximately 105 million acres

5. Many of Sturgeon's arguments resemble a facial challenge to NPS's general regulatory authority over nonfederal land within conservation system units. However, the district court's finding that Sturgeon had pleaded an as-applied challenge, *Sturgeon*, 2013 U.S. Dist. LEXIS 157078, 2013 WL 5888230, at *1, is not contested on appeal, and we therefore limit our consideration to the regulation as applied to Sturgeon.

of federal land in Alaska for protection of natural resource values by permanent federal ownership and management." *Nat'l Audubon Soc'y v. Hodel*, 606 F. Supp. 825, 827-28 (D. Alaska 1984). Portions of those lands were used to expand existing units of the National Park System and create new units, which were to be administered by the Secretary of the Interior. 16 U.S.C. § 410hh; *id.* § 410hh-1. Such units included national parks, preserves, and monuments. See 16 U.S.C. § 410hh; *id.* § 410hh-1. ANILCA refers to units of the National Park System situated in Alaska as "conservation system unit[s]" ("CSUs"). 16 U.S.C. § 3102(4).

Not all lands that lie within the boundaries of a CSU are owned by the federal government. Where possible, Congress drew unit boundaries "to include whole ecosystems and to follow natural features," and was thus cognizant of the fact that state, Native, or private-owned land could fall within the boundaries of CSUs. *Marsh*, 749 F.2d at 1417 (quoting 125 Cong. Rec. 9905 (1979)). The presence of both federal-owned and nonfederal-owned land lying within CSUs led Congress to clarify two things: first, what land would actually comprise the CSUs, and second, more generally, how land falling within a CSU's boundaries—whether federally owned or not—could be regulated. *See id.* (discussing the House version of ANILCA and the "Tsongas substitute" in the Senate).

Such clarification came in ANILCA § 103(c). The full text of that subsection reads as follows:

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> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

Section 103(c) thus contains three separate instructions regarding the composition and regulation of CSUs. First, only "public lands" lying within the boundaries of a CSU are "deemed to be included as a portion of such unit." *Id.* Under ANILCA, "public lands" are "[f]ederal lands" (including "lands, waters, and interests therein") in which the United States holds title after December 2, 1980. *Id.* § 3102(1)-(3). The first sentence of § 103(c) makes clear that the boundaries of CSUs "do[] not in any way change the status of that State, native, or private land" lying within those boundaries. 125 Cong. Rec. 11158 (1979).

The second sentence of § 103(c) declares that state, Native, and private-owned land shall not be subject to

"regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c). Accordingly, under § 103(c)'s plain text, only public land lying within a CSU's boundaries may be subjected to *CSU-specific regulations*—nonfederal land is expressly made exempt from such regulations. As the 1979 Senate Report on ANILCA makes clear, nonfederal land would not be "subject to the management regulations which may be adopted to manage and administer any national [CSU] *which is adjacent to, or surrounds, the private or non-federal public lands*." S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247 (emphasis added). Importantly for purposes of this case, in contrast to CSU-specific regulations, "[f]ederal laws and regulations of general applicability to both private and public lands" are "unaffected," and "would be applicable to private or non-federal public land holdings within [CSUs]." *Id.*

Finally, § 103(c)'s third sentence provides that the Secretary of the Interior may acquire nonfederal land lying within a CSU's boundaries; such land would then "become part of the unit" and may "be administered accordingly." 16 U.S.C. § 3103(c). Once acquired, what was previously nonfederal land would no longer be free from "regulations applicable solely to public lands within [CSUs]." *Id.*; *see also* 126 Cong. Rec. 21882 (1980) (noting that "if the [Native-]corporations ever decide to dispose of their property, [it] could become part of the [CSU]").

B.

With this background in mind, we easily resolve Sturgeon's appeal. Sturgeon argues that the plain language of ANILCA § 103(c) removes nonfederal lands from the reach of federal regulations promulgated to manage public lands. Thus, his argument goes, NPS may not enforce the hovercraft ban on the lower portion of the Nation River that falls within the Yukon-Charley because the water and submerged land of that river is owned by the state of Alaska.

While we agree with Sturgeon that § 103(c) is unambiguous, we find that it unambiguously forecloses his interpretation. The plain text of s§ 103(c) only exempts nonfederal land from "regulations applicable ***solely*** to public lands within [CSUs]." 16 U.S.C. § 3103(c) (emphasis added). The regulation at issue, banning hovercraft use in the Yukon-Charley, is not so limited.

In 1976, Congress vested the Secretary of the Interior with the authority to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." 16 U.S.C. § 1a-2(h). Pursuant to this grant of authority, the Secretary promulgated a number of regulations to "provide for the proper use, management, government, and protection of persons, property, and natural and cultural resources within areas under the jurisdiction of the National Park Service." 36 C.F.R. § 1.1(a). Within the chapter of the Code of Federal Regulations

containing those regulations, parts 1 through 5 "apply to all persons entering, using, visiting, or otherwise within" federally owned lands and waters administered by NPS and "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters." 36 C.F.R. § 1.2(a)(1), (3). The hovercraft ban is located within part 2 of that chapter. *See* 36 C.F.R. § 2.17(e).

In short, then, the hovercraft ban is not one that "appli[es] solely to public lands within [CSUs]" in Alaska. 16 U.S.C. § 3103(c). Rather, this regulation applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks. Thus, even assuming (without deciding) that the waters of and lands beneath the Nation River have been "conveyed to the State" for purposes of § 103(c), that subsection does not preclude the application and enforcement of the NPS regulation at issue. Because of its general applicability, the regulation may be enforced on both public and nonpublic lands alike within CSUs. Though Sturgeon might prefer a more robust regulatory exemption, we "must presume that a legislature says in a statute what it means and means in a statute what it says." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461-62, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)).[6]

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6. Because we resolve this case based on the plain text of the statute, we need not address whether our decisions in *John v. United States (Katie John III)*, 720 F.3d 1214 (9th Cir. 2013), *John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001) (en

C.

Sturgeon acknowledges that § 103(c)'s language exempts nonfederal lands from regulations applicable "solely" to public lands, but argues that overreliance on the word "solely" leads to a result contrary to the express legislative purpose of restricting federal authority over nonfederal land within CSUs. "When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 n. 29, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978); *see also Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 653 (9th Cir. 2009) (quoting *North Dakota v. United States*, 460 U.S. 300, 312, 103 S. Ct. 1095, 75 L. Ed. 2d 77 (1983)) (internal quotation mark omitted) (stating that when statutory language is clear, its "language must ordinarily be regarded as conclusive"). But even if we consider the legislative history of ANILCA, we find no support for Sturgeon's claim. Rather, the legislative records from the House and Senate contain numerous statements supporting the plain language of the statute. The sponsor of § 103(c) in the House offered the view that his amendment "restate[d] and ma[de] clear" that nonfederal lands within CSUs would not be "subject to regulations which are applied to public lands which, in fact, are part of the unit." 125 Cong. Rec. 11158 (1979). The primary sponsor of ANILCA in the House declared that nonfederal land would not be constrained by "regulations applicable

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banc) (per curiam), or *State of Alaska v. Babbitt (Katie John I)*, 72 F.3d 698 (9th Cir. 1995) supply an alternative basis for affirming the district court.

to the public lands within the specific conservation system unit." 125 Cong. Rec. 9905 (1979). The House Concurrent Resolution that added § 103(c) to ANILCA specified that "only public lands (and not State or private lands) are to be subject to the [CSU] regulations applying to public lands." 126 Cong. Rec. 30498 (1980). Finally, the Senate Report notes that § 103(c) would exempt nonfederal land from "regulations which may be adopted to manage and administer any [CSU] which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247.[7] Rather than help Sturgeon, the legislative history confirms that ANILCA § 103(c) did not purport to exempt nonfederal lands within CSUs from generally applicable federal laws and regulations like the hovercraft ban.

D.

Next, Sturgeon argues that our decision in *City of Angoon v. Marsh*, 749 F.2d 1413 (9th Cir. 1984), supports his interpretation. Sturgeon's reliance on *Marsh*, however, is misplaced. *Marsh* involved the interaction between

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7. Sturgeon also claims that until 1996, NPS did not purport to have regulatory authority over state-owned lands and waters within CSUs, but in July 1996, NPS reversed course. Even if so, NPS's current view comports with the text of the statute, and to the extent Sturgeon believes that NPS's purported change in position militates against deference, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the Chevron framework." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

two subsections of ANILCA § 503. The first, § 503(b), established the Admiralty Island National Monument, which was composed of 921,000 acres "of public lands." *Id.* at 1416 (emphasis omitted) (quoting ANILCA, Pub. L. No. 96-487, § 503(b), 94 Stat. 2371 (1980)). The second, § 503(d), stated that "[w]ithin the Monument[], the Secretary shall not permit the sale of [sic] harvesting of timber." *Id.*

Reading these two subsections in conjunction, we held that the district court erred in finding that "all lands within the boundaries of a National Forest System Monument"—including private lands—"come within the harvesting prohibition of section 503(d)." *Id.* (emphasis omitted). We pointed out that under § 503(b), the Admiralty Island National Monument, "by definition, consists solely of public or federally owned lands." *Id.* Thus, § 503(d)'s use of the phrase "[w]ithin the Monument" was inapplicable "to *private lands* which are within the boundaries of a national forest conservation system unit." *Id.* (emphasis added and omitted).

Marsh clearly is inapposite to the present dispute. First, *Marsh*'s discussion of § 103(c) is largely dicta because that subsection was inapplicable to the timber harvesting ban at issue. While ANILCA § 103(c) refers to "regulations applicable solely to public lands within such units," § 503(d) imposes a statutory prohibition against timber harvesting. At most, *Marsh* drew inferences from § 103(c) for the purpose of determining the reach of § 503(d). *See id.* at 1418 (noting that the court examined sections 102, 103(c), 503(d), and 506(c) "harmoniously" to determine Congressional intent regarding the ban

on timber harvesting). Second, *Marsh* offers little guidance in Sturgeon's case because, if promulgated as a regulation, § 503(d)'s ban on timber harvesting would fall under § 103(c)'s exception to the application of regulations applying solely to public lands, while NPS's hovercraft ban does not. Section 503(d) specifically refers to activities taking place "[w]ithin the Monument[]," and thus only limits conduct taking place on public lands within a specific CSU. For that reason, if promulgated as an agency regulation, its harvesting ban would qualify as a "regulation[] applicable solely to public lands within [CSUs]," and would be unenforceable on state, Native, or private-owned land under ANILCA § 103(c). As we noted above, NPS's hovercraft ban is not so constrained, and it applies to federally owned lands and waters administered by NPS nationwide, as well as navigable waters within national parks.

V.

We reject two additional arguments asserted by Sturgeon, that the Secretary of the Interior exceeded her statutory authority in promulgating the regulation at issue and that her action raises serious constitutional concerns.

A.

The 1976 Park Service Administration and Improvement Act ("1976 Act") grants the Secretary of the Interior broad authority over boating and water-related activities within the National Park System. That authorization provides as follows:

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> [T]he Secretary of the Interior is authorized . . . [to] [p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: *Provided*, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.

16 U.S.C. § 1a-2(h). Sturgeon contends that the latter portion of this subsection restricts the Secretary's regulatory power and does not permit her to regulate any and all activities on waters within national parks.

However, the plain text of the 1976 Act merely requires that any regulations promulgated by the Secretary *complement*, and not *derogate*, Coast Guard authority over waters subject to federal jurisdiction. It does not, as Sturgeon argues, limit the Secretary's regulatory authority to that enjoyed by the Coast Guard. The Oxford English Dictionary defines "complement" to mean "to supply what is wanting," 3 *Oxford English Dictionary* 610 (2d ed. 1989), and "derogate" to mean to "diminish," *id.* at 504. Thus, under the 1976 Act, the Secretary may regulate boating and other water-related activities taking place within the National Park System and its navigable

waters so long as those regulations supplement and do not diminish the Coast Guard's authority.[8]

Indeed, the legislative history of the 1976 Act makes this clear. The concern regarding the regulatory authority of the Coast Guard was first raised by the Secretary of the Interior in a letter to the House Committee on Interior and Insular Affairs.[9] H.R. Rep. No. 94-1569, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4290, 4299. The Secretary noted that the Coast Guard possessed existing authority to "promulgate and enforce regulations for the promotion of *safety of life and property on* . . . waters subject to the jurisdiction of the United States." *Id.* (alteration in original) (emphasis added) (quoting 14 U.S.C. § 2(3)). Because many waters within the National Park System were navigable, the Secretary noted that his agency would "exercise authority concurrent with the Coast Guard in

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8. Moreover, ANILCA § 1319 provides that "[n]othing in [the statute] shall be construed as . . . superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to . . . *exercise licensing or regulatory functions in relation thereto.*" 16 U.S.C. § 3207 (emphasis added).

9. The Secretary of Transportation also submitted a letter to the House Committee "strongly object[ing]" to the fact that the bill as drafted "would authorize the Secretary of the Interior to promulgate and enforce boating regulations which relate to construction, performance, and equipment standards"—responsibility for which had been previously delegated to "the Secretary of the department in which the Coast Guard is operating." H.R. Rep. No. 94-1569, at 24 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4290, 4310.

many instances," and thus recommended an amendment clarifying that the bill's grant of regulatory authority would "not diminish the Coast Guard's authority under existing law to regulate boat design and safety." *Id.* The remainder of the bill would still, however, grant her the authority "to regulate ***recreational, commercial and other uses and activities*** relating to all waters of the National Park System." *Id.* (emphasis added).

The statute reflects just such a clarifying amendment. *See* 16 U.S.C. § 1a-2(h). Thus, both the plain text and the legislative history of the 1976 Act make clear that Sturgeon's argument that the Secretary of the Interior exceeded her statutory authority is without merit.

B.

Finally, Sturgeon contends that the Secretary's exercise of her regulatory authority under the 1976 Act implicates "serious constitutional concerns." Specifically, he raises the specter of potential violations of the Property and Commerce Clauses, though without offering any specifics as to how or why the NPS regulations contravene those clauses. We therefore decline to invalidate NPS's hovercraft ban on constitutional grounds because "[w]hatever the extent of the State's proprietary interest in [its] river[s], the pre-eminent authority to regulate the flow of navigable waters resides with the Federal Government." ***New England Power Co. v. New Hampshire***, 455 U.S. 331, 338 n.6, 102 S. Ct. 1096, 71 L. Ed. 2d 188 (1982); ***see also Alaska v. United States***, 545 U.S. 75, 116-17, 125 S. Ct. 2137, 162 L. Ed. 2d 57 (2005)

(Scalia, J., concurring in part and dissenting in part) ("If title to submerged lands passed to Alaska, the Federal Government would still retain significant authority to regulate activities in the waters of Glacier Bay by virtue of its dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power.").

VI.

We hold that even assuming that the waters of and lands beneath the Nation River have been "conveyed to the State" for purposes of ANILCA § 103(c), NPS's hovercraft ban is not a regulation that applies solely to public lands within CSUs in Alaska. Therefore, as to Sturgeon, we affirm the district court's grant of summary judgment in favor of the federal appellees. Because Alaska cannot establish standing on this record, we vacate the district court's judgment as to Alaska and remand with instructions that Alaska's action be dismissed for lack of subject matter jurisdiction.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

APPENDIX D — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, FILED OCTOBER 30, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOHN STURGEON,

Plaintiff,

and

STATE OF ALASKA,

Plaintiff-Intervenor,

vs.

SUE MASICA, *et al.*,

Defendants.

No. 3:11-cv-0183-HRH

DECISION

I. Procedural History.

In this action brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-06, plaintiff John Sturgeon and plaintiff-intervenor the State of Alaska bring "as applied" challenges to National Park Service ("NPS") regulations. Sturgeon and the State have timely filed their

opening summary judgment briefs,[1] to which defendants have responded.[2] Sturgeon and the State timely filed their reply briefs[3] and defendants[4] have timely filed their surreply[5] as contemplated by the court's scheduling order.[6] Oral argument has been heard.

On September 14, 2011, Sturgeon commenced this action. In Count I of his complaint, he seeks a declaration that the application of NPS regulations on lands belonging to the State of Alaska that are within NPS conservation system units created or expanded by the Alaska Native Lands Conservation Act (herein "ANILCA") are void as applied to him.[7] In Count II of his complaint, Sturgeon seeks a declaration that "any regulations purporting to authorize the NPS to enforce regulations which are solely applicable to public lands within conservation units on lands owned by the State of Alaska, including navigable waters, within NPS conservation units created or

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1. Docket Nos. 77 & 81.

2. Docket No. 84.

3. Docket Nos. 97 & 98.

4. Defendants are Sue Masica, Greg Dudgeon, Andee Sears, Jonathan Jarvis, the National Park Service, Sally Jewel, and the United States Department of the Interior.

5. Docket No. 101.

6. Docket No. 74 at 2.

7. Complaint for Declaratory Judgment and Injunctive Relief at 14-15, ¶ 46, Docket No. 1.

expanded by ANILCA are void."[8] In Count III, Sturgeon requests an order enjoining defendants "from interfering with [his] operation of his hovercraft on state-owned navigable waters within the Yukon-Charley" Rivers National Preserve (herein "Yukon-Charley").[9] In Count IV, he requests an order enjoining defendants "from enforcing NPS regulations, which are solely applicable to public lands within federal conservation system units, on lands belonging to the State of Alaska, including navigable waters, within the boundaries of NPS conservation units in Alaska that were created or expanded by ANILCA."[10]

In its second amended complaint in intervention,[11] the State asserted four claims for relief. The State's first claim for relief was a facial challenge to the regulations in question.[12] In its second claim for relief, the State seeks a declaration that the application and enforcement of 36 C. F. R § 1.2(a)(3) and § 13.2 violates § 103(c) of ANILCA.[13] In its third claim for relief, the State seeks a declaration that the Secretary's denial of the State's petition for rule-making was arbitrary and capricious.[14] In its fourth claim for relief, the State seeks injunctive relief prohibiting the

8. Id. at 16, ¶ 51.

9. Id. at 17, ¶ 55.

10. Id. at 18-19, ¶ 60.

11. Docket No. 45.

12. Id. at 15, ¶¶ 56-57.

13. Id. at 15, ¶¶ 58-59.

14. Id. at 15, ¶¶ 60-63.

application and enforcement of the regulations in question on State-owned lands and waters.[15]

By order of September 19, 2012,[16] the court rejected the State's first claim for relief which was a facial challenge to the NPS regulations at issue here because that claim was time-barred. Defendants now contend that both Sturgeon and the State are in fact bringing facial challenges in the guise of an "as-applied" challenge. Sturgeon and the State have pled as-applied challenges. The facts upon which Sturgeon and the State rely demonstrate application of NPS regulations to the respective activities of Sturgeon and the State. The court will address the as-applied claims.

In their briefing to the court, the State and defendants briefly discuss whether or not the State is challenging 36 C. F. R. § 13.2.[17] The court finds no evidence in the record that the defendants applied 36 C. F. R. § 13.2 to the State. As discussed hereinafter, the principal issue here is the applicability of 36 C. F. R. § 1.2 (which regulation addresses the applicability of Title 36, Part 2, as well as 36 C. F. R. Part 13 regulations) to the conduct of Sturgeon and the State.

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15. Id. at 15, ¶¶ 64-65.

16. Docket No. 53.

17. 36 C. F. R. § 13.2 addresses the applicability and scope of the Part 13 regulations which have application to NPS units in Alaska.

Appendix D

II. Statutory/Regulatory Background.

A. Alaska Native Claims Settlement Act.

In 1971, Congress enacted the Alaska Native Claims Settlement Act ("ANCSA") for purposes of addressing and resolving outstanding aboriginal claims of Native Alaskans which began to accrue in 1867 when the United States purchased Russian-America (Alaska). In addition to a monetary settlement and the conveyance of some 40 million acres of land to be divided amongst 220 Native villages and 12 regional corporations, ANCSA created the joint Federal-State Land Use Planning Commission for Alaska[18] and, by § 17(d)(2)(A), made provision for the withdrawal from public domain 80 million acres of unreserved public lands in Alaska for potential addition to or creation of new units of the national parks, forests, wildlife refuges, and wild and scenic river systems.[19]

B. Alaska National Interest Lands Conservation Act.

Based upon the work of the Commission, Congress in 1980 enacted ANILCA. In furtherance of the ANCSA § 17(d)(2)(A) withdrawals, Title II of ANILCA makes provision for the creation of or additions to the NPS. Section 201 established new "units of the National Park

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18. 43 U.S.C. § 1616. For convenience, we refer in the text of this discussion to ANCSA and ANILCA sections by statutory number, with parallel United States Code sections in a footnote.

19. 43 U.S.C. § 1616(d)(2)(A).

System [which] shall be administered by the Secretary under the laws governing the administration of such lands and under the provisions of this Act[.]"[20] Included as a new area was Yukon-Charley, "containing approximately one million seven hundred and thirteen thousand acres of public lands, as generally depicted on map numbered YUCH-90, 008[.]" § 201(10).[21] Section 201(10) expressly sets forth the purposes for this withdrawal, one of which was the maintenance of the environmental integrity of the Charley River Basin in its undeveloped, natural condition.

Section 202 of ANILCA[22] adds to existing NPS units.[23] Included by § 202(2)[24] is an addition to the Katmai National Monument[25] of 1,037,000 acres of public land, to be known as Katmai National Preserve ["Katmai"]. Katmai is to be administered to protect habitat, including fish populations, and to protect scenic geological, cultural, and recreational features. § 202(2).[26]

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20. 16 U.S.C. § 410hh.

21. 16 U.S.C. § 410hh(10).

22. 16 U.S.C. § 410hh-1.

23. 16 U.S.C. § 410hh-1.

24. 16 U.S.C. § 410hh-1(2).

25. Renamed Katmai National Park by § 202(2).

26. 16 U.S.C. § 410hh-1(2).

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Included in Yukon-Charley are the lower reaches of the Nation River. Included in Katmai is the Alagnak River.[27]

For purposes of the implementation of ANILCA, that act contains definitions which are critical to understanding the act. The key terms are "land," "federal land," and, most important of all, "public lands." "Land" means "lands, waters, and interests therein." § 102(1).[28] "Federal land" means "lands the title to which is in the United States" after the date of enactment of ANILCA. § 102(2).[29] "Public lands" means "land situated in Alaska which, "after the date of enactment of ANILCA are Federal lands, except:

> land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska of the State under any other provision of Federal Law.

§ 102(3)(A).[30] Finally, "conservation system unit" is defined to include the various NPS units addressed by ANILCA. § 102(4).[31] Yukon-Charley and Katmai are conservation system units for purposes of ANILCA.

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27. The Alagnak River is also designated by § 601(25) as a wild and scenic river within the NPS. 16 U.S.C. § 1274(a)(25).

28. 16 U.S.C. § 3102(1).

29. 16 U.S.C. § 3102(2).

30. 16 U.S.C. § 3102(3)(A).

31. 16 U.S.C. § 3102(4).

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Collapsing the foregoing definitions for ease of discussion of the circumstances in this case, "public lands" are waters or interests in waters in Alaska owned by the United States in 1980. Excluded from public lands are interests in land and/or water confirmed or granted to the State of Alaska under any federal law.

Somewhat buried in the "maps" section of ANILCA is § 103(c)[32] which is at the heart of this litigation:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

C. National Park Service Administration Improvement Act and Regulations.

In order to facilitate the administration of the national park system, the Secretary of the

32. 16 U.S.C. § 3103(c).

> Interior is authorized, under such terms and conditions as he may deem advisable, to carry out the following activities:
>
> . . . .
>
> Promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: Provided, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.

16 U.S.C. § 1a-2(h).

Relying upon and in furtherance of the above act, the Secretary of the Interior had adopted by 1997 the following general provision of Title 36 of the Code of Federal Regulations for areas administered by the NPS. Section 1.2[33] provides as follows:

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33. The parties have discussed at length the history of 36 C. F. R. § 1.2. Because this 1997 regulation is clear and unambiguous, and because the court has before it only as-applied challenges to the NPS regulations, there is no need to delve into the development of § 1.2. It is the interplay between § 1.2 and ANILCA § 103(c) which is critical to a disposition of this case.

Appendix D

Applicability and scope.

(a) The regulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within:

(1) The boundaries of federally owned land sand waters administered by the National Park Service;

. . . .

(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or low-lands;

. . . .

(5) Other lands and waters over which the United States holds a less-than-fee interest, to the extent necessary to fulfill the purpose of the National Park Service administered interest and compatible with the nonfederal interest.

(b) The regulations contained in parts 1 through 5, part 7, and part 13 of this chapter

> do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.

36 C. F. R. § 1.2(a), (b).

Summarizing the foregoing, subsections (a)(1) through (5) of § 1.2 apply to everyone going within the boundaries of all NPS administered lands in the United States. Navigable waters within the boundaries of such lands are subject to regulation, irrespective of ownership of submerged lands.[34]

The Secretary of the Interior has also promulgated 36 C. F. R. Part 13, containing regulations applicable to the NPS units in Alaska. Section 13.2(a) provides:

> The regulations contained in part 13 are prescribed for the proper use and management of park areas in Alaska and supplement the general regulations of this chapter. The general regulations contained in this chapter are applicable except as modified by part 13.

36 C. F. R. § 13.2(a). With respect to park areas, § 13.2(b) provides:

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34. For reasons explained hereinafter, the provisions of § 1.2(a)(5) do not come into play in this case.

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> Subparts A through F contain regulations applicable to park areas. Such regulations amend in part the general regulations contained in this chapter. The regulations in subparts A through F govern use and management, including subsistence activities, within the park areas, except as modified by special park regulations in subparts H through V.

36 C. F. R. § 13.2(b).

In furtherance of his/her general administrative duties, the Secretary of the Interior has promulgated specific regulations which pertain to entries within the boundaries of NPS administered lands using hovercraft or helicopters. Title 36, Code of Federal Regulations, § 2.17(e), provides that "[t]he operation or use of hovercraft is prohibited." Section 2.17(a)(3) provides that the following is prohibited:

> Delivering or retrieving a person or object by parachute, helicopter, or other airborne means, except in emergencies involving public safety or serious property loss, or pursuant to the terms and conditions of a permit.

36 C. F. R. § 2.17(a)(3).

Part 2 regulations, including § 2.17(a)(3) and (e), are expressly subject to § 1.2(a), as provided by § 1.2(b). Part 13 regulations are also subject to § 1.2(a), as provided by § 1.2(b), except to the extent that Part 13 regulations

modify or amend the general regulations. Sturgeon and the State have not pointed to, and the court does not perceive there to be any amendment of the subparts A through F, Alaska-specific regulations with respect to park areas.[35] Therefore, the regulations specific to the use of helicopters and hovercraft have application within the boundaries of Yukon-Charley and Katmai, including the navigable waters of those NPS administered areas, **unless** Sturgeon and the State are correct in arguing that 36 C. F. R. § 1.2 (and therefore§§ 2.17(a)(3) and (e) and Part 13 as well) does not apply within the boundaries of Yukon-Charley and Katmai because of the provisions of ANILCA § 103(c).[36]

III. Factual Background.

Sturgeon's complaint and the State's second amended complaint in intervention focus upon their respective use of the Nation River and the Alagnak River. The lower reaches of the Nation River are within the boundaries of Yukon-Charley. The upper reaches of the Alagnak River are within the boundaries of Katmai. Both Yukon-Charley and Katmai are national parks created or expanded by ANILCA §§ 201 and 202. The Nation River arises in the

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35. There are, in subparts H and O, special regulations applicable to the Alagnak River as a wild river and to Katmai National Park and reserve. The Alagnak regulation has to do with bear viewing. 36 C. F. R. § 13.550. The subpart O regulations contain general provisions with respect to fishing, wildlife viewing, firearms, and the use of Lake Camp and Brooks Camp Developed Area. 36 C. F. R. §§ 13.1202-1242.

36. 16 U.S.C. § 3103(c).

Ogilvie Mountains of Yukon Territory, Canada, near the U. S. border, and flows in a southerly direction into Alaska and then into the northeastern quadrant of Yukon-Charley where it ultimately joins the Yukon River. The Alagnak River arises in the Aleutian Range south of Lake Iliamna and flows in a westerly direction through Katmai National Preserve. The Alagnak empties into Kvichak Bay, then into Bristol Bay.

It is undisputed that those portions of the Nation and Alagnak Rivers which are the subject of this litigation are within a conservation system unit as defined by § 102(4) and that both rivers have been determined to be navigable. Because the Nation and Alagnak Rivers are navigable, the State holds title to the lands under the navigable waters in trust for the people of Alaska, "that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." Ill. Cent. R. Co. v. State of Ill., 146 U.S. 387, 452, 13 S. Ct. 110, 36 L. Ed. 1018 (1892); Alaska v. United States, 545 U. S. 75, 78-79, 125 S. Ct. 2137, 162 L. Ed. 2d 57 (2005).[37]

Sturgeon alleges that while he was on a moose hunting trip in 2007, the NPS informed him that he could not use

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37. "The common-law public trust doctrine has been incorporated into the constitution and statutes of Alaska." State, Dep't of Natural Resources v. Alaska Riverways, Inc., 232 P. 3d 1203, 1211 (Alaska 2010). "The people of the state have a constitutional right to free access to and use of the navigable or public water of the state" and "[t]he state has full power and control of all of the navigable or public water of the state, both meandered and unmeandered[.]" AS § 38. 05. 126(a), (b).

his small personal hovercraft on the Nation River within the boundaries of the Yukon-Charley. Sturgeon alleges that upon returning from his hunting trip, he had phone conversations and met with Andee Sears, a special agent for the NPS, who "reaffirmed the NPS's position that use of a hovercraft within the boundaries of the Yukon-Charley is a crime . . . and warned plaintiff that he would be criminally cited if he ever again operated the hovercraft within the Yukon-Charley".[38] In October 2010, Sturgeon petitioned the NPS "to engage in rule-making to repeal or amend NPS regulations so that the NPS would no longer assert the authority to restrict access on navigable waters located within the boundaries of park areas in Alaska."[39] Sturgeon received no response to his petition.[40] On July 26, 2011, Sturgeon sent a letter to the regional chief ranger of the Alaska district of the NPS, requesting that the chief ranger "confirm in writing whether I will be able to launch in the Yukon or the lower reaches of the Nation with my hovercraft so I can access that part of the Nation upriver from the Yukon-Charley boundary."[41] Sturgeon received no response to this letter.[42]

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38. Complaint for Declaratory Judgment and Injunctive Relief at 11, ¶ 36, Docket No. 1.

39. Id. at 12, ¶ 40; see also, Exhibit A, Complaint for Declaratory Judgment and Injunctive Relief, Docket No. 1.

40. Id. at 13.

41. Exhibit B at 2, Complaint for Declaratory Judgment and Injunctive Relief, Docket No. 1.

42. Complaint for Declaratory Judgment and Injunctive Relief at 13, ¶ 41, Docket No. 1.

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In 2010, the Alaska Department of Fish and Game was required to apply to defendants for a scientific research and collecting permit to conduct genetic sampling on chum salmon in the Alagnak River.[43] "Access to State lands was to be by helicopter. . . ."[44]

On September 30, 2010, the State petitioned the Secretary of the Interior to repeal or amend § 1.2(a)(3) to make it in applicable to Alaska, with a corresponding repeal of the revisions to 36 C. F. R. § 13.2.[45] The petition was denied on January 13, 2012.[46]

IV. Jurisdiction.

The parties disagree as to whether Sturgeon and the State have standing to bring their as-applied regulatory claims with respect to the Kobuk and Yukon Rivers.[47] Sturgeon mentions the Yukon River in his complaint, but he has not asserted any separate claim based upon the Yukon River; and the NPS regulations that Sturgeon is challenging were applied to him with respect to his use of

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43. Second Amended Complaint in Intervention [etc.] at 12, ¶ 2b, Docket No. 45.

44. Id. at 13.

45. Id. at 11, ¶ 44.

46. Id. at 11, ¶ 46.

47. Defendants concede that this court has jurisdiction over Sturgeon's claims based on the Nation River and the State's claims based on the Alagnak River. Defendants' Sur-Reply on Motions for Summary Judgment at 4, Docket No. 101.

a hover-craft on the Nation River within Yukon-Charley. Similarly, the State never pled any factual allegations relating to its access to the Kobuk National Park. The court therefore concludes that it is defendants' application of 36 C. F. R. § 1.2 and the related Part 2 regulations to Sturgeon and the State with respect to their operations on the Nation and Alagnak Rivers which is before the court. Claims as to the Kobuk and Yukon Rivers have not been put before the court.

V. Standard of Review.

"Summary judgment is a suitable vehicle for resolution of a challenge to agency action under the Administrative Procedure Act. . . ." Western Watersheds Project v. Salazar, 766 F. Supp. 2d 1095, 1104 (D. Mont. 2011) (citing Nw. Motorcycle Ass'n v. United States Dep't of Agric., 18 F. 3d 1468, 1471-72 (9th Cir. 1994)). "However, unlike the typical civil summary judgment resolution, the [c]ourt does not make findings of fact or determine the existence of genuine issues of material fact." Id. "The [c]ourt must instead review the Administrative Record that was before the federal agency at the time it made its decision to determine whether the record supports the agency's decision. . . ." Id.

"'Because this case involves an administrative agency's construction of a statute that it administers, [the court's] analysis is governed by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694. . . .'" Rodriguez v. Smith, 541 F.3d 1180, 1183 (9th Cir. 2008) (quoting Mujahid v.

Daniels, 413 F.3d 991, 997 (9th Cir. 2005)). "Under the Chevron framework" the court "must 'first determine[] if Congress has directly spoken to the precise question at issue, in such a way that the intent of Congress is clear.'" Id. at 1184 (quoting Mujahid, 413 F. 3d at 997). "'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Id. (quoting Chevron, 467 U. S. at 842-43). "'[I]f the statute is silent or ambiguous with respect to the specific issue,' the court moves to step two of the Chevron inquiry, and considers 'whether the agency's answer is based on a permissible construction of the statute.'" Blandino-Medina v. Holder, 712 F. 3d 1338, 1343 (9th Cir. 2013) (quoting Chevron, 467 U. S. at 843).

VI. Discussion.

Sturgeon and the State argue that the NPS general regulations may not be applied to them because of § 103(c) of ANILCA.[48] They point out that 36 C. F. R. § 1.2 purports to grant the NPS regulatory authority over state-owned navigable waters within the boundaries of Yukon-Charley and Katmai. They contend that § 103(c) of ANILCA forbids the NPS from exercising its regulatory authority over state-owned navigable waters within park boundaries in Alaska.

48. 16 U. S. C § 3103(c).

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The first sentence of § 103(c) provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act)shall be deemed to be included as a portion of such unit.[49]

It is clear beyond any room for discussion that the river beds and waters of the Alagnak and Nation Rivers are lands within the boundaries of Yukon-Charley and Katmai, both of which are ANILCA conservation system units. The first sentence of § 103(c) provides that only "public lands" are part of the respective conservation units (Yukon-Charley and Katmai). The State's submerged lands — the beds of the Nation River and the Alagnak River — are owned by the State, not the United States. The river beds are not included in — are not part of — conservation units Yukon-Charley or Katmai.

The State's submerged lands — the beds of the Nation River and the Alagnak River — are not the only interests to be addressed. For purposes of ANILCA, "land" means land or water or interests in them. The State owns "the natural resources within such lands and waters." 43 U.S.C. § 1311(a). The United States is entitled to regulate and improve navigation on navigable waters in furtherance of commerce. United States v. 32.42 Acres of Land in San Diego County, 683 F.3d 1030, 1037 (9th Cir. 2012). However, the federal government's rights as

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49. 16 U. S. C § 3103(c).

regards navigation is not an interest inland for purposes of ANILCA. Alaska v. Babbitt, 72 F. 3d 698, 702-03 (9th Cir. 1995) ("Katie John I").[50] The Katie John I decision stands for the further proposition that the United States may have reserved water rights with respect to navigable waters within ANILCA conservation units; and where such reserved water rights exist, the United States does own public land for purposes of ANILCA. Id. at 703-04. The State claims to "own" the waters of the Nation and Alagnak Rivers. Defendants contend that the United States owns reserved water rights in the Nation and Alagnak Rivers, thereby making the rivers "public lands" for purposes of ANILCA.

Each of the United States and the State have correlative rights with respect to navigable waters. But we need not decide here which if any of the correlative rights with respect to the navigable waters (as distinguished from submerged lands) of the Nation and Alagnak Rivers are owned by the State or the United States, or whether such interests are or are not public land. The principal issue in this case is whether or not 36 C. F. R. § 1.2(a) (and therefore also § 2.17 and Part 13) applies to the respective operations of Sturgeon and the State within the boundaries of Yukon-Charley and Katmai. The first sentence of § 103(c) does not address that issue.

The second sentence of § 103(c) does address the application of Title 36 regulations. It reads:

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50. Katie John I "remains controlling law" despite Katie John II. John v. United States, 720 F.3d 1214, 1226 (9th Cir. 2013).

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> No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within suchunits.[51]

The parties disagree as to whether the beds of the Nation and Alagnak Rivers, and such other rights as the State may own, were "conveyed to the State." The river beds were not transferred to the State by means of a deed or patent such as the federal government routinely uses in transferring selected lands from public domain to the State. Here, there is no evidence of a conveyance of river beds to the State. However, § 102(3)(A) of ANILCA expressly provides that "lands which have been confirmed to . . . or granted to the Territory of Alaska or the State under any other provision of Federal law" are excluded from "public lands."[52] The State acquired title to the beds of the Nation and Alagnak Rivers under the Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), and the Submerged Lands Act, 43 U.S.C. §§ 1311-15. Because of the State ownership of the river beds, those river beds are not "public lands" for purposes of ANILCA. § 102(3).[53] However, the fact that the beds of the Nation and Alagnak Rivers are not public lands does not answer the question: "Does 36 C. F. R. § 1.2 and the underlying specific regulations of 36 C. F. R. Part 2 or Part 13 nevertheless

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51. 16 U.S.C. § 3103(c).

52. 16 U. S. C. § 3102(3)(A).

53. 16 U.S.C. § 3102(3).

have application to the activities of Sturgeon and the State within the boundaries of Yukon-Charley and Katmai?" On its face, § 1.2 has application to them because, on the facts of this case, both Sturgeon and the State entered and carried on activities "within. . . [t]he boundaries of federally owned lands and waters administered by the National Park Service. . . ." 36 C. F. R. § 1.2(a). Again, subsection (a) is applicable by the terms of 36 C. F. R. § 1.2(b), and application of § 1.2(a) does not depend upon ANILCA or the State's rights as to navigable waters.

Assuming for the sake of discussion that the beds of the Nation and Alagnak Rivers which the State owns by virtue of the Submerged Lands Act are deemed to have been "conveyed" to the State for purposes of § 103(c) of ANILCA,[54] the second sentence of § 103(c) is dispositive in this case. The regulations which § 103(c) excludes from application to State lands are those "regulations applicable solely to public lands within such units."[55] Title 36, C. F. R. § 1.2, and Part II of Title 36 (including § 2.17)were enacted by the Department of the Interior pursuant to its general authority to adopt regulations for all NPS administered lands and waters. None of those regulations was adopted "solely" to address entry upon or use of various equipment on public lands within ANILCA-created conservation units such as Yukon-Charley and Katmai.

There are regulations contained within Title 36 which have been adopted and are "applicable solely to public

54. 16 U.S.C. § 3103(c).

55. 16 U.S.C. § 3103(c).

lands within [ANILCA units]." 36 C. F. R. § 103(c).[56] Part 13 of Title 36 contains the regulations which are applicable to NPS units in Alaska, including Yukon-Charley and Katmai. The Part 13 regulations "supplement the general regulations. . . ." 36 C. F. R. § 13.2(a). Part 13 regulations might "modify" or "amend" general regulations applicable to park areas. 36 C. F. R. § 13.2(a) and (b). But Part 13 regulations have not altered or amended the helicopter or hovercraft regulations of § 2.17.

It is arguable that Part 13 regulations do not apply to state-owned submerged lands within Yukon-Charley and Katmai because of § 103(c).[57] But the regulations which expressly proscribe the use of hovercraft and helicopters within the boundaries of NPS administered lands are contained in Part 2 of Title 36, not Part 13. The regulations contained in Part 2, and in particular §§ 2.17(e) and 2.17(a)(3) are not regulations applicable solely to public lands within conservation system units. They are regulations of general application across the entirety of the NPS.

The foregoing disposes of Sturgeon's and the State's claims based upon NPS regulations. There remains the State's third claim for relief by which the State seeks review of the defendants' denial of its petition for rule-making. The State did not present any argument with respect to its third claim in its opening brief. Defendants contend that the claim has been abandoned. The State

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56. 16 U.S.C. § 3103(c).

57. 16 U.S.C. § 3103(c).

contends that it addressed this claim because, if the challenged regulations are invalid, then it was arbitrary and capricious of the defendants to deny the State's petition for rule-making. Inasmuch as defendants have prevailed with respect to the application of 36 C. F. R. § 1.2, it follows that the denial of the State's petition for rule-making was not arbitrary or capricious.

VII. Conclusion

The court concludes that 36 C. F. R. § 1.2(a), §§ 2.17(e) and 2.17(a)(3) were properly applied to the respective operations of Sturgeon and the State.

Sturgeon's complaint[58] is dismissed with prejudice. Intervenor the State of Alaska's second amended complaint[59] is dismissed with prejudice. The clerk of court shall enter judgment accordingly.

DATED at Anchorage, Alaska, this 30th day of October, 2013.

/s/ H. Russel Holland
United States District Judge

58. Docket No. 1.

59. Docket No. 45.

APPENDIX E — 16 U.S.C. § 3103

16 U.S.C. § 3103

§ 3103. Maps

(a) Filing and availability for inspection; discrepancies; coastal areas

The boundary maps described in this Act shall be on file and available for public inspection in the office of the Secretary or the Secretary of Agriculture with regard to the National Forest System. In the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling, but the boundaries of areas added to the National Park, Wildlife Refuge and National Forest Systems shall, in coastal areas not extend seaward beyond the mean high tide line to include lands owned by the State of Alaska unless the State shall have concurred in such boundary extension and such extension is accomplished under the notice and reporting requirements of this Act.

(b) Changes in land management status; publication in Federal Register; filing; clerical errors; boundary features and adjustments

As soon as practicable after December 2, 1980, a map and legal description of each change in land management status effected by this Act, including the National Wilderness Preservation System, shall be published in the Federal Register and filed with the Speaker of the House of Representatives and the President of the Senate,

and each such description shall have the same force and effect as if included in this Act: *Provided, however,* That correction of clerical and typographical errors in each such legal description and map may be made. Each such map and legal description shall be on file and available for public inspection in the office of the Secretary. Whenever possible boundaries shall follow hydrographic divides or embrace other topographic or natural features. Following reasonable notice in writing to the Congress of his intention to do so the Secretary and the Secretary of Agriculture may make minor adjustments in the boundaries of the areas added to or established by this Act as units of National Park, Wildlife Refuge, Wild and Scenic Rivers, National Wilderness Preservation, and National Forest Systems and as national conservation areas and national recreation areas. For the purposes of this subsection, a minor boundary adjustment shall not increase or decrease the amount of land within any such area by more than 23,000 acres.

(c) Lands included within unit; acquisition of land by Secretary

Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such

lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

APPENDIX F — 36 C.F.R. § 1.2

36 C.F.R. § 1.2

§ 1.2 Applicability and scope.

(a) The regulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within:

(1) The boundaries of federally owned lands and waters administered by the National Park Service;

(2) The boundaries of lands and waters administered by the National Park Service for public-use purposes pursuant to the terms of a written instrument;

(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or lowlands;

(4) Lands and waters in the environs of the District of Columbia, policed with the approval or concurrence of the head of the agency having jurisdiction or control over such reservations, pursuant to the provisions of the Act of March 17, 1948 (62 Stat. 81);

(5) Other lands and waters over which the United States holds a less-than-fee interest, to the extent

necessary to fulfill the purpose of the National Park Service administered interest and compatible with the nonfederal interest.

(b) The regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.

(c) The regulations contained in part 7 and part 13 of this chapter are special regulations prescribed for specific park areas. Those regulations may amend, modify, relax or make more stringent the regulations contained in parts 1 through 5 and part 12 of this chapter.

(d) The regulations contained in parts 2 through 5, part 7, and part 13 of this section shall not be construed to prohibit administrative activities conducted by the National Park Service, or its agents, in accordance with approved general management and resource management plans, or in emergency operations involving threats to life, property, or park resources.

(e) The regulations in this chapter are intended to treat a mobility-impaired person using a manual or motorized wheelchair as a pedestrian, and are not intended to restrict the activities of such a person beyond the degree that the activities of a pedestrian are restricted by the same regulations.

APPENDIX G — 36 C.F.R. § 2.17

36 C.F.R. § 2.17

§ 2.17 Aircraft and air delivery.

(a) The following are prohibited:

(1) Operating or using aircraft on lands or waters other than at locations designated pursuant to special regulations.

(2) Where a water surface is designated pursuant to paragraph (a)(1) of this section, operating or using aircraft under power on the water within 500 feet of locations designated as swimming beaches, boat docks, piers, or ramps, except as otherwise designated.

(3) Delivering or retrieving a person or object by parachute, helicopter, or other airborne means, except in emergencies involving public safety or serious property loss, or pursuant to the terms and conditions of a permit.

(b) The provisions of this section, other than paragraph (c) of this section, shall not be applicable to official business of the Federal government, or emergency rescues in accordance with the directions of the superintendent, or to landings due to circumstances beyond the control of the operator.

(c)(1) Except as provided in paragraph (c)(3) of this section, the owners of a downed aircraft shall remove the

aircraft and all component parts thereof in accordance with procedures established by the superintendent. In establishing removal procedures, the superintendent is authorized to: (i) Establish a reasonable date by which aircraft removal operations must be complete; (ii) determine times and means of access to and from the downed aircraft; and (iii) specify the manner or method of removal.

(2) Failure to comply with procedures and conditions established under paragraph (c)(1) of this section is prohibited.

(3) The superintendent may waive the requirements of paragraph (c)(1) of this section or prohibit the removal of downed aircraft, upon a determination that: (i) The removal of downed aircraft would constitute an unacceptable risk to human life; (ii) the removal of a downed aircraft would result in extensive resource damage; or (iii) the removal of a downed aircraft is impracticable or impossible.

(d) The use of aircraft shall be in accordance with regulations of the Federal Aviation Administration. Such regulations are adopted as a part of these regulations.

(e) The operation or use of hovercraft is prohibited.

(f) Violation of the terms and conditions of a permit issued in accordance with this section is prohibited and may result in the suspension or revocation of the permit.

No. 17-949

In the Supreme Court of the United States

JOHN STURGEON, PETITIONER

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 103(c) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3103(c), divests the National Park Service of authority to regulate activities on navigable waters within the boundaries of National Park System units in Alaska.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 872 F.3d 927. An earlier opinion of the court of appeals (Pet. App. 26a-57a) is reported at 768 F.3d 1066. The decision of the district court (Pet. App. 58a-81a) is not published in the Federal Supplement but is available at 2013 WL 5888230.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2017. The petition for a writ of certiorari was filed on January 2, 2018 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The National Park Service Organic Act, ch. 408, 39 Stat. 535, established the National Park Service and directed the Secretary of the Interior (Secretary) to manage the parks for the "fundamental purpose" of "conserv[ing] the scenery, natural and historic objects, and wild life" therein in a manner that "will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. 100101(a) (Supp. III 2015). Congress directed the Secretary to "prescribe such regulations as the Secretary considers necessary or proper for the use and management" of the National Park System. 54 U.S.C. 100751(a) (Supp. III 2015).

Subsequently, Congress expressly provided that the Secretary may regulate activities to protect waters within units of the National Park System, by authorizing the Secretary in 1976 to "prescribe regulations * * * concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States." 54 U.S.C. 100751(b) (Supp. III 2015); see Act of Oct. 7, 1976, Pub. L. No. 94-458, 90 Stat. 1939. Navigable waters are waters subject to the jurisdiction of the United States. See *United States* v. *Rands*, 389 U.S. 121, 123 (1967); *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 404-405 (1940).

Exercising those authorities, the National Park Service has long set forth regulations to protect the waterways in National Parks, including rules governing fishing, sanitation, water skiing, and other activities. See, *e.g.*, 36 C.F.R. 2.13, 2.24, 2.28, 2.31 (1967). Among other rules, the National Park Service has prohibited the "operation or use of hovercraft" within the National Park System. 36 C.F.R. 2.17(e). That rule applies not only

within "[t]he boundaries of federally owned lands and waters administered by the National Park Service," but also on "[w]aters subject to the jurisdiction of the United States" within the boundaries of the National Park System—including navigable waters like the Nation River—without regard to the ownership of submerged lands beneath the waters. 36 C.F.R. 1.2(a)(1) and (3).

b. In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (16 U.S.C. 3101 *et seq.*)—the most recent in a series of major statutes addressing the allocation of federal lands in Alaska.

The United States acquired the land that became the State of Alaska in 1867 through a treaty with Russia that did not address the land tenure, if any, of Alaska Natives. 136 S. Ct. 1061, 1064-1065. As a consequence, title to the vast majority of the available land in Alaska remained uncertain—and potentially subject to competing aboriginal title claims by Alaska Natives—when the Alaska Statehood Act (Statehood Act), Pub. L. No. 85-508, 72 Stat. 339, was enacted in 1958. The Statehood Act authorized the State to select more than 100 million acres of "vacant and unappropriated" federal public lands in Alaska. § 6(a), 72 Stat. 340; see 136 S. Ct. at 1065.

The Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, which was enacted in 1971, sought to resolve conflicting claims to land in Alaska by extinguishing claims of aboriginal title, while also directing that certain lands be withheld from state selection and instead be available for Native groups and for reservation by the United States for conservation purposes. See 136 S. Ct. at 1065. The Native lands were to be selected by Alaska Native Corporations, 43 U.S.C. 1603(b),

1605, 1607, 1610-1615, and the federal lands reserved for conservation purposes were to be withdrawn by the Secretary, see 43 U.S.C. 1616(d)(2). ANCSA contemplated that the Secretary's recommendations would be approved by Congress within five years. 43 U.S.C. 1616(d)(2)(D). But after the Secretary designated lands for federal conservation purposes, Congress did not approve the recommendations within the statutory period. 136 S. Ct. at 1065. President Carter then invoked his authority under the Antiquities Act of 1906, ch. 3060, 34 Stat. 225, to designate the Secretary's selections as National Monuments without congressional approval. See 136 S. Ct. at 1065-1066.

Congress sought to put an end to these lands controversies through ANILCA. 136 S. Ct. at 1066. ANILCA took steps to effectuate the conveyance of Statehood Act land selections to the State and of ANCSA land selections to Alaska Native Corporations. See ANILCA §§ 1416-1431, 94 Stat. 2499-2543. And it fulfilled ANCSA's promise of preserving additional lands as parks and refuges in Alaska by setting aside millions of acres of public lands containing "nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values" to the United States, 16 U.S.C. 3101(a); see 136 S. Ct. at 1065, and by "continu[ing] * * * the opportunity for subsistence uses by rural residents of Alaska" on the public lands so reserved, 16 U.S.C. 3111. The lands reserved for conservation are set aside in "conservation system unit[s]"—a term of art referring to "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness

Preservation System, or a National Forest Monument." 16 U.S.C. 3102(4); see 43 U.S.C. 1616(d)(2).

In creating new conservation system units, Congress stated that it intended to ensure the preservation of the areas it set aside—including their "waters," "freeflowing rivers," and "fish." 16 U.S.C. 3101. In addition, in each of the 13 provisions of ANILCA that either created or expanded a unit of the National Park System, Congress enacted a statement of purpose describing features of the area at issue that Congress intended to protect. See 16 U.S.C. 410hh, 410hh-1. In each case, those statutory purposes included protection of bodies of water such as rivers and lakes, protection of fish or marine mammal populations, or a combination thereof. *Ibid.* For some units of the National Park System, Congress's declared purposes included ensuring protection of particular identified waters. See 16 U.S.C. 410hh(1) (Aniakchak River); 16 U.S.C. 410hh(6) ("the Kobuk River Valley, including the Kobuk, Salmon, and other rivers"); 16 U.S.C. 410hh(8) (Noatak River); 16 U.S.C. 410hh(10) ("the entire Charley River basin"); see also 16 U.S.C. 410hh-1(2) ("to maintain unimpaired the water habitat for significant salmon populations").

Section 103(c) of ANILCA, 16 U.S.C. 3103(c), at issue in this case, was added to the bill that became ANILCA immediately prior to its enactment, to clarify the status of state-owned, Native-Corporation owned, and privately owned lands falling within the boundaries of conservation system units in Alaska. See Pet. App. 45a-47a. Because "Congress drew the boundaries of those units to 'follow hydrographic divides or embrace other topographic or natural features,'" millions of acres of state, Native Corporation, and private land fell within

conservation unit boundaries. 136 S. Ct. at 1066 (citation omitted). Congress specified that such areas should not be subjected to regulations applicable solely to public lands, by providing:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.

16 U.S.C. 3103(c).

c. The Secretary has long concluded that navigable waters within National Parks and other conservation system units in Alaska can be regulated as public lands under ANILCA, by virtue of the doctrine of reserved water rights. That determination, in turn, has been ratified by Congress.

In connection with ANILCA's subsistence-use priority on "public lands," the Secretary determined that the definition of "public lands" under ANILCA includes navigable waters in which the United States has reserved water rights. See Gov't C.A. Br., *John* v. *United States*, No. 94-35481, 1994 WL 16058810, at *3-*4 (9th Cir. Sept. 19, 1994). The Ninth Circuit then agreed that "public lands" include "those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Alaska* v. *Babbitt*, 72 F.3d 698, 704 (1995) (*Katie John I*), cert. dismissed, 516 U.S. 1036, and cert. denied, 517 U.S. 1187 (1996), adhered to *sub nom. John* v. *United States*, 247 F.3d 1032 (9th Cir. 2001) (en banc) (per curiam). Thereafter, the Secretary promulgated regulations through notice-

and-comment procedures concluding that the United States has reserved water rights in the navigable waters that lie within National Parks in Alaska, which meant that those waters can be regulated as "public lands" within the meaning of ANILCA. 50 C.F.R. 100.3(b); see 64 Fed. Reg. 1276, 1279 (Jan. 8, 1999); see also 62 Fed. Reg. 66,216, 66,217-66,218 (Dec. 17, 1997) (proposed rule).

Congress delayed for several years, through temporary moratoria, the implementation of the regulations that identified "public lands" in this manner. See, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. III, § 336, 110 Stat. 1321-210. But it ultimately provided that the Secretary's regulations would take effect unless before October 1, 1999, Alaska enacted its own subsistence-use priority (in which case, under ANILCA, state subsistence-use rules, rather than federal subsistence-use rules, would govern public lands). See Department of the Interior and Related Agencies Appropriations Act, 1999 (1999 Appropriations Act), Pub. L. No. 105-277, Div. A, Tit. III, § 339(b)(1), 112 Stat. 2681-296. When Alaska did not do so, the federal regulations took effect. See 16 U.S.C. 3102 note.

Since 1996, National Park Service regulations have also made clear that National Park Service rules apply on all "[w]aters subject to the jurisdiction of the United States, includ[ing] navigable waters," "within the boundaries of [the] National Park System." 61 Fed. Reg. 35,133 (July 5, 1996) (internal quotation marks omitted); see 36 C.F.R. 1.2(a)(3) (rules apply to navigable waters "without regard to the ownership of submerged lands"). In promulgating that rule, the Secretary explained that the rule "clarifies and interprets existing [National Park Service] regulatory intent, practices and policies,"

rather than adopting any new position. 61 Fed. Reg. at 35,133.[1] In adopting that rule, the Secretary also rejected Alaska's contention that "ANILCA § 103(c) preempts [the National Park Service's] well-established authority on navigable waters" within Alaska. *Id.* at 35,135.

2. a. In September 2007, National Park Service officers observed petitioner repairing a hovercraft on the Nation River within the Yukon-Charley Rivers National Preserve, in violation of the regulation that bars the "operation or use of hovercraft" in the National Park System, 36 C.F.R. 2.17(e). Pet. App. 31a. The officers instructed petitioner to remove the hovercraft from the Yukon-Charley Rivers National Preserve. *Ibid.*

Petitioner complied, but later filed suit. Pet. App. 31a-32a. He challenged whether the National Park Ser-

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[1] The Secretary explained that the National Park Service had long treated its regulations as applicable on navigable waters within National Parks, and had issued regulations that depended on that premise. See 61 Fed. Reg. at 35,133 (citing examples). In 1987, however, an amendment providing that National Park Service rules were generally not applicable on *state* lands led to a dispute concerning the National Park Service's authority over navigable waters. *Id.* at 35,134 (citing 52 Fed. Reg. 35,238 (Sept. 18, 1987)). A person who had been issued a citation for shooting a seal in navigable waters of Glacier Bay National Park in Alaska contended that the 1987 amendment had deprived the National Park Service of authority on the waters in question, because States own the submerged lands beneath navigable waters in many National Parks. *Id.* at 35,133. The Secretary explained that the 1987 amendment had not been intended to alter the National Park Service's practice of regulating use of navigable waters within parks. *Id.* at 35,134. The revised rule clarified that the prior practice remained valid, by making park rules applicable on all navigable waters, irrespective of "ownership of submerged lands." *Ibid.*

vice had authority to regulate activity on navigable waters within units of the National Park System in Alaska. *Id.* at 32a. Petitioner argued that the Nation River and other navigable waters were "state-owned," and that Section 103(c) of ANILCA "precludes [the National Park Service] from regulating activities on state-owned lands and navigable waters that fall within the boundaries of National Park System units in Alaska." *Id.* at 30a.

b. The district court rejected petitioner's claim, granting summary judgment to the government. Pet. App. 58a-81a. The court concluded that petitioner's challenge failed even if the navigable waters of the Nation River were state-owned. It reasoned that Section 103(c) only limits the authority of the National Park Service to impose *Alaska-specific* rules on state-owned, Native-Corporation-owned, and privately owned lands within National Park System boundaries. *Id.* at 79a-80a. In reaching that conclusion, the court emphasized that Section 103(c) states that it limits only "those 'regulations applicable *solely* to public lands within [conservation system] units,'" and that conservation system units is a term that refers only to lands set aside in Alaska. *Id.* at 79a (quoting 16 U.S.C. 3103(c)) (emphasis added). Since the hovercraft ban applies throughout the National Park System, the court concluded that Section 103(c) posed no bar to the application of the hovercraft ban. *Id.* at 80a.

c. The court of appeals affirmed. Pet. App. 26a-57a. Like the district court, the court of appeals concluded that Section 103(c) concerns only Alaska-specific regulations on state, Native Corporation, or privately held land within the boundaries of the National Park System in Alaska. *Id.* at 48a-49a. It observed that the hovercraft regulation was "not so limited," because it "applies

to all federal-owned lands and waters administered by [the National Park Service] nationwide, as well as all navigable waters lying within [N]ational [P]arks." *Ibid.*

d. This Court granted a writ of certiorari and vacated the court of appeals' decision. 136 S. Ct. at 1064, 1072. The Court concluded that Section 103(c) could not reasonably be read as a prohibition on Alaska-specific regulations, when Section 103(c) was read in the context of other provisions of ANILCA. The Court emphasized that "ANILCA repeatedly recognizes that Alaska is different," and contains numerous "Alaska-specific provisions." *Id.* at 1070. Interpreting Section 103(c) in the context of those Alaska-specific provisions, the Court found it "implausible" that Congress would have prohibited the National Park Service from enacting rules or exceptions "recognizing Alaska's unique conditions." *Id.* at 1071.

The Court observed that the government had principally contended that the National Park Service could enforce rules on the Nation River within the Yukon-Charley Rivers National Preserve based "on very different arguments" than the one adopted by the court of appeals, noting that "[t]he agency stresse[d] that it has longstanding authority to regulate waters within federally managed preservation areas, and that Section 103(c) does not take any of that authority away." 136 S. Ct. at 1069. The Court "d[id] not decide" any of these arguments. *Id.* at 1072. It noted that the court of appeals could address on remand, among other questions, whether the Nation River qualifies as "public land" for purposes of ANILCA, and whether the National Park Service has authority under 54 U.S.C. 100751(b) (Supp. III 2015) to regulate petitioner's activities on areas of

the Nation River within the boundaries of the park system, even if the river is not "public" land. 136 S. Ct. at 1072.

e. On remand, a unanimous panel of the court of appeals rejected petitioner's challenge to the application of the hovercraft rule, concluding that Section 103(c) did not strip the National Park Service of its authority to protect navigable waters within the boundaries of federal preserves. Pet. App. 1a-19a. The court observed that under longstanding circuit precedent, "ANILCA's 'definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine.'" *Id.* at 12a (citation omitted); see *id.* at 12a-13a (discussing *Katie John I*, 72 F.3d at 703; *John* v. *United States*, 720 F.3d 1214, 1232-1233 (9th Cir. 2013), cert. denied, 134 S. Ct. 1759 (2014)); see also *id.* at 8a (noting that "ANILCA's definition of 'land'" encompasses "lands, waters, *and interests therein*") (citation omitted). Applying that understanding, the court observed that it had upheld application on navigable waters within the National Park System of subsistence-use regulations for public lands. *Id.* at 12a-13a. The court also determined that application of the hovercraft rule at issue here—like the application of the subsistence-use regulations in its earlier decisions—served the purposes "for which ANILCA reserved lands as conservation system units." *Id.* at 14a. Accordingly, the court concluded, "ANILCA [S]ection 103(c) does not limit the National Park Service from applying the hovercraft ban on the Nation River in the Yukon-Charley." *Id.* at 19a.

Two members of the panel also joined a concurring opinion. Pet. App. 20a-23a (Nguyen, J., concurring). They agreed that under longstanding court of appeals

precedent, the United States could enforce the hovercraft rule based on its reserved-water-right interest in the waters at issue here. *Ibid.* But they would have concluded that the federal navigational servitude—rather than the reserved-water-rights doctrine—is the basis of the National Park Service's authority to enforce its regulations on navigable waters within conservation system units in Alaska. *Id.* at 21a-23a.

ARGUMENT

Petitioner challenges the court of appeals' determination that the National Park Service may enforce a rule concerning use of hovercraft on the navigable waters of the Nation River within the Yukon-Charley Rivers National Preserve. The court of appeals correctly rejected petitioner's claim. Its decision does not conflict with any decision of this Court or another court of appeals, and it does not present a question of exceptional importance warranting this Court's intervention. Further review is unwarranted.

1. The court of appeals correctly rejected petitioner's contention that the National Park Service lacks authority to regulate activity on any navigable waters within the boundaries of National Park System units in Alaska. The federal government has "paramount power" over navigable waters in the United States, *PPL Mont., LLC* v. *Montana*, 565 U.S. 576, 591 (2012) (citation omitted), pursuant to its "dominant servitude" or "superior navigation easement," *United States* v. *Twin City Power Co.*, 350 U.S. 222, 225 (1956) (citations omitted); see *Kaiser Aetna* v. *United States*, 444 U.S. 164, 174 (1979), see also *Alaska* v. *United States*, 545 U.S. 75, 116-117 (2005) (Scalia, J., concurring in part and dissenting in part).

Exercising that authority, Congress authorized the Secretary to "prescribe regulations * * * concerning boating and other activities on or relating to water located within [National Park] System units, including water subject to the jurisdiction of the United States." 54 U.S.C. 100751(b) (Supp. III 2015). The Secretary permissibly exercised that authority by promulgating rules concerning boating, fishing, and hovercraft use on navigable waters within units of the National Park System.

Section 103(c) limits federal regulation of the state, Native Corporation, and private inholdings that were brought within units of the National Park System when ANILCA drew unit boundaries around entire ecosystems. It does so by providing that "[n]o lands which, before, on, or after" the date of ANILCA's enactment "are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units," and that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." 16 U.S.C. 3103(c). Section 103(c) thus limits regulation of lands that are not "public lands."

As the court of appeals correctly concluded, Section 103(c) does not withdraw, within Alaska, the Secretary's authority to enforce rules protecting navigable waters within units of the National Park System. While Section 103(c) protects state-owned, Native-Corporation-owned, and privately owned lands from "regulations applicable solely to public lands within [conservation system] units," navigable waters are not lands that were "conveyed to the State, to any Native Corporation, or to

any private party." 16 U.S.C. 3103(c). Under the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which was made applicable in Alaska through the Statehood Act, States generally hold "title to and ownership of the lands *beneath* navigable waters," and title to "the natural resources *within* such lands and waters," 43 U.S.C. 1311(a) (emphases added), but not to the navigable waters themselves. That is because "[n]either sovereign nor subject can acquire anything more than a mere usufructuary right" in navigable waters. *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954) (citation omitted); see *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 744 (1950) ("As long ago as the Institutes of Justinian, running waters, like the air and the sea, were *res communes*—things common to all and property of none."); *Federal "Non-Reserved" Water Rights*, 6 Op. O.L.C. 328, 365-366 (1982).

Nor did Congress withdraw the Secretary's authority under Section 100751(b) to regulate the use of hovercraft or other activities on the Nation River within the Yukon-Charley Rivers National Preserve by providing that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." 16 U.S.C. 3103(c). That portion of Section 103(c) does not affect the Secretary's express authority under Section 100751(b) because Section 100751(b) broadly authorizes the Secretary to make rules "concerning boating or other activities *on or relating to* water located within [National Park] System units, *including water subject to the jurisdiction of the United States*"—a category that encompasses navigable waters. 54 U.S.C. 100751(b) (Supp.

III 2015) (emphases added). The Secretary's authority under Section 100751(b) thus does not turn on whether particular navigable waters constitute "a portion of [a conservation system] unit." 16 U.S.C. 3103(c). And the Secretary has exercised that authority by promulgating rules regarding hovercraft use that expressly apply on navigable waters of the United States (like the Nation River) within the boundaries of units of the National Park System, see 36 C.F.R. 1.2(a)(3), without any threshold requirement that those waters be specially classified as "a portion of [a park system] unit," 16 U.S.C. 3103(c).

Moreover, even if the Secretary could enforce rules within conservation unit boundaries only on areas satisfying ANILCA's definition of public lands, that requirement would be met here, in light of the United States' reserved water rights. See Pet. App. 9a-18a. ANILCA defines "public lands" as "lands, waters, *and interests therein*" to which the United States holds title. 16 U.S.C. 3102(1)-(3) (emphasis added); *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 548 n.15 (1987). The United States has a reserved interest in waters that are appurtenant to federal land reservations, to the extent that such an interest is necessary to effectuate the purposes for which the federal lands are reserved. *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976); see *United States* v. *New Mexico*, 438 U.S. 696, 709-711 (1978). And those reserved water rights are property interests. *Niagara Mohawk Power Corp.*, 347 U.S. at 251; see *Gerlach Live Stock Co.*, 339 U.S. at 736; see also *Arizona* v. *California*, 460 U.S. 605, 620 (1983) (describing reserved water rights as "rights in real property"). Accordingly, "the definition of public lands" under ANILCA "includes those navigable waters in which the

United States has an interest by virtue of the reserved water rights doctrine." *Alaska* v. *Babbitt*, 72 F.3d 698, 703-704 (9th Cir. 1995) (*Katie John I*), cert. dismissed, 516 U.S. 1036, and cert. denied, 517 U.S. 1187 (1996), adhered to *sub nom. John* v. *United States*, 247 F.3d 1032 (9th Cir. 2001) (en banc) (per curiam).

That understanding is embodied in regulations that Congress has ratified. The Secretary of the Interior and the Secretary of Agriculture promulgated regulations almost two decades ago to address the geographic scope of subsistence-use regulations that are applicable only on "public lands." See 16 U.S.C. 3114. In promulgating those regulations, the Secretary determined that public-lands rules concerning subsistence use would apply on the navigable waters inside the Yukon-Charley Rivers National Preserve and on other navigable waters appurtenant to federal lands in conservation system units, in light of the government's reserved-water-right interest in those waters. 64 Fed. Reg. at 1277, 1286-1287.

The court of appeals affirmed that approach, in decisions this Court declined to review. *Katie John I*, 72 F.3d at 704; *John* v. *United States*, 720 F.3d 1214, 1245 (9th Cir. 2013), cert. denied, 134 S. Ct. 1759 (2014). And Congress ratified the approach as well, by directing that (absent specified state action that Alaska did not take) those regulations would take effect. See 1999 Appropriations Act § 339(b)(1), 112 Stat. 2681-296; 16 U.S.C. 3102 note; pp. 6-7, *supra*.

Petitioner does not dispute (Pet. 30 n.2) that the United States has an "interest[]" in navigable waters within conservation system units for purposes of ANILCA's provisions permitting the Secretary to adopt subsistence-management rules for those waters.

Nor does amicus State of Alaska. See Alaska Amicus Br. 17 n.3 ("Alaska supports the subsistence regulations."). Rather, petitioner and the State suggest that the United States has an "interest[]" in those waters under ANILCA's "public lands" definition, 16 U.S.C. 3102(1) and (3), only for purposes of subsistence-use rules, and not for purposes of conservation-related rules. The court of appeals correctly found that position untenable. As the court observed, "ANILCA's definition of 'public lands' applies throughout the statute." Pet. App. 13a. Petitioner's approach, in which waters with associated federal reserved water rights would be "public lands" for some ANILCA purposes, but not for others, cannot be squared with ANILCA's single definition of "public lands" that applies across the Act's subsistence-use and conservation provisions. 16 U.S.C. 3102(3); see *Gambell*, 480 U.S. at 546 & n.13 (single definition of "public lands" that applies across multiple ANILCA provisions).

Moreover, Congress's identification of the purposes for which it reserved lands in ANILCA leaves no room for an argument that the federal government has reserved water rights in the navigable waters within the National Park System for purposes of subsistence use, but not for purposes of conserving park ecosystems, including protecting waters, rivers, and fish. Congress expressly identified each of those objectives as purposes of the reservations of land. See 16 U.S.C. 410hh, 3101. And it cannot seriously be contended that ANILCA's subsistence-use purposes require reservation of appurtenant waters, but its conservation purposes do not.

Surrounding provisions confirm that Section 103(c) did not abrogate the Secretary's authority to protect navigable waters in units of the National Park System

in Alaska pursuant to Section 100751(b). This Court previously observed that the Ninth Circuit's initial interpretation of Section 103(c) as a limitation on only Alaska-specific regulations "may be plausible in the abstract," 136 S. Ct. at 1070, but was not plausible when Section 103(c) was read in the context of surrounding provisions that showed Congress understood Alaska-specific regulations would sometimes be warranted, *id.* at 1070-1071.

Petitioner's reading of Section 103(c) is likewise implausible when considered in light of surrounding provisions. Congress stated repeatedly that its purposes in placing new areas in Alaska under the Park Service's regulatory authority through ANILCA included "to protect and preserve * * * rivers," 16 U.S.C. 3101(b), to protect the "waters" in the new and expanded units, 16 U.S.C. 3101(a), and to preserve opportunities for canoeing and fishing on "freeflowing rivers," 16 U.S.C. 3101(b). It did the same in its statements designating particular units for inclusion in the National Park System, including designations that state an intent to protect particular navigable waters like the "Aniakchak River," 16 U.S.C. 410hh(1), "the Kobuk River Valley, including the Kobuk, Salmon, and other rivers," 16 U.S.C. 410hh(6), and "the Noatak River," 16 U.S.C. 410hh(8), and "the entire Charley River basin," in the Yukon-Charley Rivers National Preserve, "including streams, lakes and other natural features," 16 U.S.C. 410hh(10). And specific provisions constraining the Secretary's authority to regulate activity such as motorboating, 16 U.S.C. 3121(b), and commercial fishing rights, see 16 U.S.C. 410hh-4, also reflect the premise that the Secretary may otherwise restrict ac-

tivity occurring on navigable waters within conservation system units. Those provisions demonstrate that Congress specifically intended that the National Park Service would have authority to protect the navigable waters within the parks and preserves that ANILCA created.

2. No further review is warranted of the court of appeals' determination that the National Park Service may enforce its hovercraft rule on navigable waters in which the United States has reserved water rights, within the boundaries of National Park System units in Alaska. The case presents no conflict among courts of appeals. Nor does the extent of the Secretary's authority to regulate boating, hovercraft use, and similar activities on navigable waters within the boundaries of parks in Alaska present a question of exceptional importance warranting this Court's intervention in the absence of a conflict.

Petitioner contends (Pet. 21-22) that this Court made clear that the question presented here was of sufficient importance to warrant this Court's intervention when it granted a writ of certiorari to review the Ninth Circuit's earlier decision construing Section 103(c) in petitioner's case. That argument is mistaken because the Ninth Circuit's prior decision could be understood to have much broader ramifications. As petitioner argued in his prior petition for a writ of certiorari, the Ninth Circuit's initial decision indicated that state-owned, Native-Corporation-owned, and privately owned lands within National Park System boundaries could be regulated as though they were publicly held lands—so long as they were not regulated through Alaska-specific regulations. 14-1209 Pet. 18-30. Petitioner accordingly argued that the earlier decision warranted review because "[t]he

Ninth Circuit has granted [the National Park Service] plenary authority to regulate State, Native Corporation, and private lands within Alaska's [N]ational [P]arks and preserves as though these lands were in fact part of these parks." *Id.* at 3. Petitioner further argued that this holding "ha[d] significant social and economic ramifications for the people of Alaska," because of the vast quantities of state-held, Native-Corporation-held, and privately held land within the boundaries of National Parks. *Id.* at 18; see *id.* at 19 (stating that the case "concerns the regulatory disposition of more than 19 million acres of Alaskan land," including 18 million acres of Native-Corporation-owned land falling within park boundaries). And petitioner argued that the Ninth Circuit's ruling would mean that "Native Corporations will be foreclosed from developing roughly 30 percent of the land that Congress conveyed to them." *Id.* at 20; see *id.* at 3 ("Alaska Natives depend on this land for economic support, which will be denied to them by [National Park Service] regulations that destroy its economic value and deny to these landowners the right to make productive use of their property."). No comparable considerations support certiorari here. The reserved-water-rights-based decision on remand does not suggest that the federal government may exercise control over the state-held, Native-Corporation-held, and privately held land at the center of the prior petition, because the decision on remand affirms only the National Park Service's authority to regulate ***navigable waters*** within units of the National Park System for particular purposes based on the reserved-water-rights doctrine, using the authorities in Section 100751(b).

Petitioner suggests (Pet. 22-23) that federal regulation of hovercraft use and other activities on navigable

waters within units of the National Park System constitutes an intrusion on state sovereignty that justifies this Court's intervention. But the court of appeals' determination that Section 103(c) did not withdraw the Secretary's authority under Section 100751(b) in Alaska simply affirms the applicability—within Alaska—of federal authority under Section 100751(b) that undisputedly applies to waters within units of the National Park System everywhere else in the country.

Moreover, petitioner is mistaken in suggesting (Pet. 21) that the decision subjects such waters to "the plenary control of [the National Park Service]." Section 100751(b) does not give the United States plenary authority over waters within units of the National Park System. And beyond this, the court of appeals explained that the United States has reserved water rights on waters appurtenant to federal lands within units of the National Park System only "to the extent needed to accomplish the purposes of the reservations." Pet. App. 12a (quoting *Katie John I*, 72 F.3d at 703). The court emphasized that the hovercraft regulation here serves the purposes for which Congress directed that the Yukon-Charley Rivers National Preserve be managed, including "maintain[ing] the environmental integrity of the entire Charley River basin, including streams, lakes, and other natural features." *Id.* at 14a (quoting 16 U.S.C. 410hh(10)); see *id.* at 15a-16a. The decision upholding application of the hovercraft regulation under these circumstances is correct and raises no issues of broad importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2018

No. 17-949

In the Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNOPPOSED MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR DIVIDED ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, *Amicus Curiae* State of Alaska respectfully moves for leave to participate in oral argument and for divided argument in this case. Alaska requests that ten minutes of Petitioner John Sturgeon's argument time be allocated to Alaska. Mr. Sturgeon supports this motion and agrees to cede ten minutes of his time to counsel for the State of Alaska. Granting this motion therefore would not require this Court to enlarge the overall time set for oral argument. Alaska last week filed an *Amicus Curiae* brief in support of Mr. Sturgeon and wishes to present argument on points that are of unique and particular importance to the State, and that are aligned with, but distinct from, those presented in Petitioner's brief. Argument has been scheduled for this case on November 5, 2018. This is the second time that this case has been before the Court; in the 2015 Term this Court granted Alaska's motion for leave to participate in argument and for divided argument, and Alaska's counsel argued the case. Alaska requests the same here. The Solicitor General's Office has agreed to non-oppose the motion.

This case is about who has regulatory authority over tens of thousands of miles of navigable waters within Alaska—the State of Alaska or a federal land management agency. The question presented—whether the Alaska National Interests Lands Conservation Act of 1980 ("ANILCA") gives the National Park Service plenary regulatory authority over tens of thousands of miles of waters within Alaska, including navigable waters flowing above submerged lands owned by the State of Alaska—is one of great concern to the citizens of Alaska. Because the Ninth Circuit's decision below interprets ANILCA to transfer state decision-making authority about management of Alaska's waters to a federal agency, this case raises fundamental questions of federalism. In answering those questions, this Court will consider an Alaska state-specific statute that directly implicates the State of Alaska's sovereign rights as well as the exceptional needs of ordinary Alaskans.

The State of Alaska's interests in this case are different from, yet complementary to, Mr. Sturgeon's. By allowing the Park Service to assume management authority over State-owned lands and waters, the Ninth Circuit's ruling below strikes at the heart of Alaska's sovereignty and imperils Alaska's ability to manage and control its abundant resources for the benefit of its people. The State's "ownership of [its] submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water"—like its right to regulate its navigable waters—is "an essential attribute of sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132 (2013) (internal quotation marks omitted); *Coyle v. Smith*, 221 U.S. 559, 573 (1911). And the significance of natural resources management is critical to the State: control over the state's vast natural resources is central to Alaska's ability to govern and has been a central compact of Alaska's sovereignty since statehood. Alaska is the entity best suited to present argument regarding the right to manage its own waters and the harms to its sovereignty

that flow from the Ninth Circuit's decision. The State itself has been forced to ask for permission from a federal agency to access and use its own waters, even for benign scientific study on salmon stocks—prompting the State to mount an independent challenge to the Park Service's regulatory expansion through a companion case that the Ninth Circuit considered together with Mr. Sturgeon's.

The effects of the Court's ruling in this case also extend far beyond the State's political independence and academic questions of federalism. It will implicate the daily lives of Alaska's citizens. Alaska's rural residents in particular confront unique access challenges and have exceptional social, economic, and transportation needs due to the state's harsh climate, extremely rural character, and limited infrastructure. The State of Alaska can offer a helpful, important perspective on the manner in which the Ninth Circuit's decision impedes its ability to meet the extraordinary needs of Alaskans, who depend on the State's waters. And it can demonstrate how the Ninth Circuit's decision cripples Alaska's ability to overcome these challenges through local, Alaska-based waters regulation designed by decisionmakers who are knowledgeable of and focused on local conditions, obstacles, and needs. Thus, Alaska is uniquely positioned to offer argument to this Court about not just the harms to its sovereignty that flow from the Ninth Circuit's decision, but also about the practical effects and broad impacts and consequences of the Ninth Circuit's underlying decision.

The interests of amicus State of Alaska are therefore distinct from Mr. Sturgeon and of overarching interest to the people of the State. Because of the importance of the issues at stake; because Alaska is the only state to which ANILCA applies; and because the State is affected both as a sovereign and as the steward of its people, Alaska has a direct, profound, and important interest in being heard on this matter.

This Court has granted similar motions for divided argument and allowed States to appear and present oral argument as amicus curiae where state sovereignty issues were presented or where the State had a valuable perspective distinct from Petitioner or Respondent. *See, e.g.*, *ONEOK, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591 (2015); *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008); *Leegin Creative Leather Prods. Inc. v. PSKS Inc.* (2007); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.* (2007), 550 U.S. 330 (2007); *Halbert* v. *Michigan*, 125 S. Ct. 1822 (2005); *Clingman* v. *Beaver*, 125 S. Ct. 825 (2005); *Jackson* v. *Birmingham Bd. of Educ.*, 125 S. Ct. 457 (2005); *City of Boerne* v. *Flores*, 519 U.S. 1088 (1997); *City of Littleton* v. *Z.J. Gifts D-4, L.L.C.*, 541 U.S. 901 (2004); and *Aetna Health Inc.* v. *Davila*, 540 U.S. 1175 (2004). Indeed, the Court granted Alaska's motion to argue this very case in the 2015 Term. *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016) (argued Jan. 20, 2016).

The State of Alaska believes that it can offer the Court a helpful, valuable perspective on resolution of the question presented that is distinct from Mr. Sturgeon's, and that the Court's resolution of this case would benefit from divided argument. The State therefore respectfully requests that it be allotted ten minutes of Petitioner's time.

Respectfully submitted,

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No. 17-949

IN THE

Supreme Court of the United States

JOHN STURGEON,

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BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF

The brief in opposition ("BIO") is familiar. The last time Petitioner sought review, the government opposed based mostly on alternative arguments and its insistence that Mr. Sturgeon's claim of importance "rest[ed] on misunderstandings of NPS's regulations and of the decision below." Br. in Opp. at 13, *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016) (No. 14-1209). The Court disagreed with those arguments and granted review. The Court unanimously reversed, noting that "while defending the reasoning of the Ninth Circuit," the government relied "primarily on very different arguments." *Sturgeon*, 136 S. Ct. at 1069. The Court then remanded the case for the Ninth Circuit to consider the government's alternative arguments. On remand, the Ninth Circuit seized on one of those arguments to reach the same result, holding that the Nation River is "public land" under ANILCA.

In opposing review now, the government takes the same approach. It again characterizes the remand decision as limited in effect, BIO 20, again defends the judgment below with an alternative argument the Ninth Circuit did not adopt (*i.e.*, the concurrence's rationale), *id.* at 12-15, and again suggests that Petitioner's claim of importance rests on a "mistaken" understanding of the remand decision's reach, *id.* at 21.

The government's opposition is as unconvincing as it was last time. A Ninth Circuit decision declaring significant portions of Alaska to be "public land" under a federal statute designed to insulate the State from federal encroachment is unquestionably important. Neither the remand decision's rationale nor the alternative argument

that the government favors is legally defensible. And the ruling's scope is (once again) anything but narrow, effecting a sweeping transfer of control over Alaska's waters from the State of Alaska to the National Park Service ("NPS"). The Court should grant the petition.

I. The government's attempt to minimize the case's importance is unsuccessful.

This case dramatically expands the authority that NPS may exercise over non-federal land and waterways, raising "vital issues of state sovereignty," *Sturgeon*, 136 S. Ct. at 1072, that are important to Alaska and the other States throughout the West, Pet. 21-27; Brief Amicus Curiae of Alaska ("Alaska Br.") 1-2, 6-8. The government's attempts to minimize the wide-ranging ramifications—and thus the significance—of the remand decision fall short.

Foremost, the government's position is premised on a serious misunderstanding of the Ninth Circuit's decision. According to the government, "the decision on remand affirms only the National Park Service's authority to regulate *navigable waters* within units of the National Park System for particular purposes based on the reserved-water-rights doctrine, using the authorities in Section 100751(b)." BIO 20. On that basis, the government argues that (unlike last time) this decision implicates only NPS's authority over navigable waters within CSUs—as opposed to the non-federal land submerged beneath them or the uplands and wetlands surrounding them. *Id.* at 19-21. The government is incorrect.

That position *might* have been defensible had the concurrence's rationale prevailed. Pet. 32 n.3. But it did not. The majority held that *any* waterways in which the United States holds a reserved water right are "public land" under ANILCA. 16 U.S.C. § 3102(3). The Ninth Circuit thus did not limit its holding to navigable waterways, nor to NPS's delegated authority under the 1976 Improvement Act to "prescribe regulations ... concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States." 54 U.S.C. § 100751(b). As "public lands," *i.e.*, "federal lands," this territory is now subject to a complete NPS takeover under the Organic Act, which empowers NPS to issue *any* regulation of *federal* parkland it "considers necessary or proper," 54 U.S.C.§ 100751(a), to "conserve [their] scenery, natural and historic objects, and wild life," 54 U.S.C. § 100101(a).

As a result, the power the Ninth Circuit granted NPS over non-federal lands and waters physically located inside Alaska CSUs is far broader than the government cares to admit. Unless this Court grants review and rejects the Ninth Circuit's holding, any state or private waterway in Alaska within a CSU where there is a reserved water right is subject to the full array of NPS authority. In short, the ruling grants NPS near-universal authority over Alaska land, water, and natural resources that the United States concedes it has not acquired.

Like last time, then, the government seeks to defend the judgment on narrower grounds that the Ninth Circuit did *not* adopt so that it may secure far broader authority if it can avoid certiorari. The Court should again reject this gambit. The "considerations" that led the Court to grant

certiorari last time have not dissipated. BIO 20. The same sovereignty and economic concerns warranting review then make review appropriate now. Pet. 21-27; Alaska Br. 4-15. Indeed, the government's belated acknowledgement that the initial Ninth Circuit ruling "could be understood to have much broader ramifications," BIO 19, should be taken as a concession that the ramifications of the remand decision are equally broad.

But reviewing the Ninth Circuit's remand decision is actually *more* important this time. Pet. 24-27. The ruling's interpretation of "public lands" raises concerns far beyond Alaska's borders, given the statutory term's prevalence in the enabling legislation of national parks across the West. *Id.* at 26-27 & n.1; Alaska Br. 25-26. The government offers no response to this concern because there can be none. If this is what "public land" means under ANILCA, it follows that the term will carry that same meaning under other federal laws too.[1]

In any event, the Court's review would be warranted even if the government were correct in claiming that the remand decision is limited only to navigable waterways themselves under the Improvement Act. Alaskans uniquely rely on access to their waters for their survival. Pet. 22-24. "Alaska's massive size, widely dispersed population, lack of developed infrastructure, variable topography, and extreme climate ... make it the nation's most remote state." Alaska Br. 5. Therefore, "Alaska's waters provide

1. The government's notation that this case does not implicate a circuit split, BIO 19, is no response. ANILCA, of course, is an Alaska-specific statute. And the overwhelming majority of territory that could be implicated by the remand decision is located in the Ninth Circuit. Pet. 26-27 n.1.

essential travel corridors year round" so that those living in remote regions of the State can "access health care, goods, and services; recreate; and travel to hunting and fishing grounds." *Id.* at 6.

Access to these waterways also is essential to Alaska's economic well-being. "Localized resource-based activities—such as local tourism and recreation-related jobs or small scale mining, sport fishing, wildlife guiding, or trapping—often provide an essential part of families' incomes and contribute to the economic activity of the region." Alaska Br. 6-7. "What is at stake here for Alaska, therefore, is not just a disagreement with the National Park Service about permissible weekend recreation or the best method of routing tourists through national parks." *Id.* at 7-8. The ruling impairs Alaska's ability "to maintain unencumbered access and meaningful use of Alaska's natural resources by its citizens." *Id.* at 8.

The government responds that (under its mistaken reading of the Ninth Circuit's decision) Alaskan waterways are just subject to the same NPS regulations that apply "everywhere else in the country." BIO 21. This is incorrect. The Ninth Circuit held that Alaska's navigable waters subject to a reserved water right are "public lands," not simply that these waters are subject to NPS authority under Section 100751(b). For the second time, the Ninth Circuit has interpreted Section 103(c) to subject lands and waters in Alaska to *more* federal regulations than "everywhere else in the country."

But even if the government were correct, review here is no less urgent. Because "Alaska is different," *Sturgeon*, 136 S. Ct. at 1070, this Court has expressed caution before

assuming that regulations should be applied to the State in the same way they apply elsewhere. The Ninth Circuit and NPS may well reject "the simple truth that Alaska is often the exception, not the rule," *id.* at 1071, and take the view that Alaska is not entitled to special dispensation. But the overarching dispute here is whether Congress, in passing ANILCA, took a different view. And this Court has always ensured that overzealous agencies and lower courts do not override the congressional determination that Alaska must be allowed to manage its natural environment for the benefit of its people. Pet. 23.

Finally, the government tries to downplay the fact that even under its own minimalist interpretation of the remand decision, NPS's authority extends not only to these waters, but all those waters that are appurtenant to them. BIO 21. The government emphasizes that before it may gain control over those additional waters, NPS must demonstrate that the regulation is "'needed to accomplish the purposes of the reservation.'" *Id.* (quoting App. 12a). But that requirement is ministerial under the Ninth Circuit's reasoning. Pet. 24-25. If a generic federal interest in "maintaining the environmental integrity," BIO 21, is all NPS needs to take control over every stream, lake, and wetland in Alaska that has some attenuated hydrological connection to navigable waterways to which the United States has reserved water rights, it is no limitation at all.

II. The government's defense of the Ninth Circuit's remand decision misses the mark.

The Ninth Circuit's conclusion that John Sturgeon was using his hovercraft on "public land" is unsustainable. Pet. 27-34. That is likely why the government mostly defends

the ruling on a different ground, namely that the hovercraft regulation should be upheld based on NPS's authority to control navigable waters (*i.e.*, the concurrence's proposed rationale). BIO 12-15. Both rationales are wrong.

The government's defense of the remand decision's actual reasoning adds little. The government cites a few cases to support its claim that "reserved water rights are property interests." BIO 15. But the brief conspicuously stops short of asserting that those reserved water rights create a "title" interest, as ANILCA requires to support categorization as "public lands." Pet. 8. That is because the government's position is that neither the United States nor Alaska holds "title to ... the navigable waters themselves." BIO 14. And whether the United States holds "title"—not whether reserved water rights are some form of a property interest—is what matters under ANILCA. Pet. 33 n.4.[2] The one thing upon which the parties seem to agree, then, is that the Ninth Circuit erred in concluding that the United States holds a title interest in these waterways.

Instead of acknowledging these flaws, the government carefully avoids exposing its disagreement with the Ninth Circuit's reasoning. In defending it, the government first points to NPS regulations as corroborating the rationale below. BIO 16. But the government, notably, does not ask for deference to NPS's interpretation of ANILCA. For good reason. The clear statement rule applies here, Pet.

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2. Moreover, it is far from clear that reserved water rights are a property interest at all. Pet. 27-28. But even if they are, reserved water rights only confer the right to use (or limit the use of) water; reserved water rights do not confer regulatory jurisdiction over the entire body of water. *Id.* at 31-33.

28-30; Alaska Br. 22-24, and, regardless, the text of the statute unambiguously forecloses NPS's unreasonable reading of ANILCA. Pet. 33-34.

The government then turns to the Ninth Circuit's *Katie John* decisions to substantiate the "public land" rationale. Supporting the Ninth Circuit, the government takes the view that the hovercraft regulation must be upheld if the subsistence regulations are valid. BIO 16-17. In so arguing, however, the government declines to grapple with the textual basis for distinguishing between the two species of regulation, Pet. 30 (discussing Title VIII of ANILCA), and how those important differences impact the scope of NPS's "navigable servitude" authority, Pet. 32 n.3. The *Katie John* decisions provide no basis for interpreting ANILCA to transfer title over non-federal land and water to the United States for NPS to manage as if it were federal parkland that has been acquired.

This half-hearted defense of the Ninth Circuit's rationale has a simple explanation: the government believes in a different argument. Like the concurrence below, the government believes it has the power to ban hovercrafts *irrespective* of ANILCA. BIO 12-15, 17-19. According to the government, Congress granted NPS authority to "prescribe regulations ... concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States," 54 U.S.C. § 100751(b), and ANILCA did not eliminate that authority, *id.* at 14-15. That is incorrect. In creating these Alaska parks and preserves, ANILCA expressly *withheld* this authority from NPS.

One of ANILCA's major concerns was to ensure that NPS could not exercise regulatory authority over the non-federal land and water that became surrounded by CSUs when the law was enacted. Pet. 8-10. Hence, although NPS generally may regulate "boating and other activities on or relating to water located within System units," under the Improvements Act, ANILCA specifically states that "[o]nly those lands within the boundaries of any conservation system unit which are public lands ... shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). If NPS wants ownership and control of these lands and water, the Secretary "may acquire" them, and if he does, "any such lands shall become part of the unit, and be administered accordingly." *Id.* But under ANILCA, NPS may not regulate "'non-public' land in Alaska as if that land were owned by the Federal Government." *Sturgeon*, 136 S. Ct. at 1068. Thus, the government's assertion that ANILCA does not specifically override NPS's general "authority under Section 100751(b) to regulate the use of hovercraft or other activities on the Nation River," BIO 14, is incorrect. That is precisely what Section 103(c) of ANILCA does. Pet. 33.[3]

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3. The government incorrectly argues that Congress has ratified its interpretation of ANILCA. BIO 16. Congress issued a moratorium on federal management of subsistence to allow Alaska time to consider enacting its own subsistence regime. But Congress did not weigh in on this dispute. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, § 339(d), 112 Stat 2681 (1998) ("Nothing in this section invalidates, validates, or in any other way affects any claim of the State of Alaska to title to any tidal or submerged land in Alaska."). An appropriation bill is a thin reed to support the argument that Congress placed its imprimatur on the Ninth Circuit's application of the reserved water rights doctrine in the *Katie John* decisions.

As a result, the government's reliance on its authority under the Commerce Clause to regulate navigable waters, BIO 12, misses the point. No one doubts the authority of the United States to ensure the flow of commerce over navigable waters or that the United States may hold "reserved water rights" in narrowly-confined circumstances. Pet. 22-24. But reserved water rights do not create a title interest, and Congress must delegate its commerce power before an agency may deploy it. *Id.* at 22. ANILCA (except as provided in Title VIII) prevents NPS from invoking the United States' federal commerce power to systematically regulate Alaska's lands and waters. Pet. 30. And any reserved water rights that NPS may hold must be invoked based on an identified need to ensure a specific federal reservation is not entirely defeated—not to circumvent ANILCA and assert plenary control over every Alaska waterway within or appurtenant to CSUs. Pet. 25-26, 31-33.[4]

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4. At times, the government suggests that all that matters, for purposes of establishing regulatory control, is that navigable waters are "subject to the jurisdiction of the United States." BIO 2. Even if true, as explained above, that power resides with Congress, and ANILCA cabins NPS's authority. But it is also untrue that navigability triggers plenary federal authority. The United States may possess "significant authority ... by virtue of its dominant navigational servitude," *Alaska v. United States*, 545 U.S. 75, 117 (2005) (Scalia, J., concurring in part and dissenting in part), but States have an important interest in navigable waters too by virtue of their ownership of the lands submerged beneath them. Alaska Br. 22-23; *see Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) ("We have long understood that as sovereign entities in our federal system, the States possess an 'absolute right to all their navigable waters and the soils under them for their own common use.'" (citation omitted)).

Finally, the government turns to ANILCA's purpose and structure. BIO 17-19. But that effort is in vain. To be sure, one of ANILCA's purposes is "'to protect and preserve ... rivers'" and other "waters" in Alaska. BIO 18 (quoting 16 U.S.C. §§ 3101 (a)-(b)). ANILCA thus expanded the National Park System by over 43 million acres. Pet. 6. But Congress also recognized the importance of ensuring "'adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people.'" *Sturgeon*, 136 S. Ct. at 1066 (quoting 16 U.S.C. § 3101(d)). That is why, as the legislative history confirms, ANILCA insulated non-federal land physically located in the CSUs from NPS's oversight and control. Pet. 8-10.

The government's structural arguments are no better. In fact, the brief's reliance on "provisions constraining the Secretary's authority to regulate activity such as motorboating ... and commercial fishing rights," BIO 18, undermines the government's argument. Those provisions afford additional protections for Alaskans on *federal* land that are unavailable in other national parks because of the State's uniqueness. *Sturgeon*, 136 S. Ct. at 1070-71. The Court has already rejected one "topsy-turvy approach" to Section 103(c). *Id.* at 1071. The notion that Congress went out of its way to give NPS less authority over federal land in Alaska than elsewhere in the country, yet gave NPS unparalleled authority over non-federal land in Alaska is equally illogical.

CONCLUSION

The Court should grant the petition.

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No. 17-949

In The
Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, in his Official Capacity as Alaska Regional Director of the National Park Service, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF ALASKA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Alaska National Interest Lands Conservation Act prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska.

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INTEREST OF AMICUS CURIAE[1]

As the Court has recognized, this case "touch[es] on vital issues of state sovereignty." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1072 (2016). This Court should hear the case again to safeguard Alaska's rights as a sovereign and to protect the State's uniquely significant need for control of state-owned lands and waters.

Alaska owns the riverbed and manages the waters of the Nation River and other lands and rivers falling within the boundaries of federal areas, called Conservation System Units (CSUs), that were created by the Alaska National Interest Lands Conservation Act (ANILCA). *See* 16 U.SC. §3101 *et seq.*; 43 U.S.C. § 1311(a); Alaska Statehood Act, § 6(m), 72 Stat. 343 (1958). Alaska's "ownership of submerged lands and the accompanying power to control navigation, fishing, and other public uses of water is an essential attribute of sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) (internal quotes omitted); *Coyle v. Smith*, 221 U.S. 559, 573 (1911). ANILCA endorsed Alaska's sovereign right to manage its lands, waters, and resources by providing that state, Native, and private lands located inside CSU boundaries would not be managed as if they were federally owned. 16 U.S.C. § 3103(c). This distinction is essential to ANILCA's purpose of providing "adequate opportunity for satisfaction of the economic and social needs of the State of

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[1] In compliance with Supreme Court Rule 37.2(a), Alaska provided counsel of record with timely notice of its intent to file this amicus brief.

Alaska and its people." 16 U.S.C. § 3101(d). Alaska has a direct and profound interest in maintaining its authority to keep its waterways open, as Congress intended, without broad federal regulatory interference.

Despite the Court's direction to consider these "vital issues of state sovereignty," *Sturgeon*, 136 S. Ct. at 1072, on remand the Ninth Circuit gave the National Park Service expanded regulatory control over state-owned lands and waters. Pet. App. 12a-14a, 19a. The Ninth Circuit's decision treats the submerged lands that Alaska acquired at statehood as federally owned lands, reading the term "public lands" expansively and ignoring ANILCA's admonition not to treat state lands the same as federal ones. If left uncorrected, the decision has broad ramifications that extend well beyond its blow to Alaska's sovereignty. It ignores the needs and realities of rural Alaskans, who face unparalleled challenges in accessing the transportation thoroughfares they rely upon to provide for their families. Alaska has compelling interests in preserving its sovereign right to responsibly manage its lands and waters and in protecting its citizens' ability to use the state's waterways.

SUMMARY OF THE ARGUMENT

This case considers the extent to which ANILCA permits the exercise of federal jurisdiction over state waters. The right to regulate and manage state-owned resources is an essential component of Alaska's

sovereignty. And the freedom to use and access navigable waters is essential to many Alaskans' way of life. By granting the National Park Service regulatory jurisdiction over state waters, the Ninth Circuit's decision threatens that way of life. The decision contravenes ANILCA's text and Congress's intent in enacting the law, dramatically redefines this Court's federal reserved water rights jurisprudence to the detriment of state sovereignty, and ignores the clear statement doctrine. If left to stand, the decision invites federal agencies to wield plenary regulatory control over non-federal waters and submerged lands. The decision raises significant sovereignty issues and has broad practical and economic ramifications, warranting this Court's review.

REASONS THE PETITION SHOULD BE GRANTED

The Court acknowledged this case's importance when it granted review the first time, and the case has only gained significance since then. Preserving ANILCA's express limits on the federal government's regulatory authority in Alaska is an issue of exceptional importance to the State and its people, and Mr. Sturgeon's petition once more presents an appropriate and timely vehicle for the Court to address it. The Ninth Circuit's decision on remand again tramples Alaska's sovereignty by effectuating a federal takeover of Alaska's navigable waters. The court's new rationale fails to properly construe ANILCA and the balance it

struck between federal and state authority in Alaska, and it compounds that problem with an incorrect expansion of the federal reserved water rights doctrine – an important federal question of law that the Ninth Circuit got wrong and that has broad implications in all public land states.

To the extent that this case arises from ANILCA's Alaska-specific text, a circuit split on this issue cannot occur. Review on certiorari provides the only opportunity for Alaskans to retain their rights to their lands, waters, and resources, and to meaningfully assure Alaska's sovereignty over its waters.

I. Certiorari is warranted because the Ninth Circuit's decision contravenes ANILCA Section 103's assurances that Alaska would retain its sovereign right to manage its lands and waters and because it imposes exceptional hardships on Alaskans.

A. Rural Alaskans depend on Alaska's lands, waters, and resources for many of their transportation, economic, and social needs.

Alaska occupies an area equivalent to one-fifth of the continental United States's landmass, and over 60% of all land in Alaska is owned by the federal government. As the largest landowner in the state, the federal government already manages an area more than four times the size of Wyoming. By contrast, the federal government owns only 4% of lands in the

non-western states. Colossal and disproportionate federal land ownership in Alaska makes the State's freedom to manage its lands, waters, and resources crucial to Alaska's political independence and economic health.

Alaska is home to abundant natural resources, including over 12,000 rivers and three million lakes – the largest network of navigable waters in the country. The State also is home to myriad fish and wildlife, significant oil and natural gas reserves, and economically viable subsurface mineral deposits. Alaska's vast terrain and wild beauty captivate the national imagination and its bounty of resources fortifies both the state and national economies. But Alaska's massive size, widely dispersed population, lack of developed infrastructure, variable topography, and extreme climate also make it the nation's most remote state. Over three-quarters of Alaska's 300 communities and roughly 20% of its 735,000 residents live in regions unconnected to the road system. Half of these residents live in the State's most remote villages, communities with disproportionately higher levels of poverty and limited infrastructure, some lacking essential services like water and sanitation. These rural citizens are acutely reliant on Alaska's resources to provide for their families. The State's ability to manage these resources in accordance with unique realities, local needs, and historical customs is thus critical to its sovereign interests.

Roadless rural Alaskans primarily travel by all-terrain vehicles; airplanes – generally regional, small bush plane, or private air service; snowmachines; and

boats. Alaska's mountainous northern climate further shapes the unusual nature of the State's limited transportation options: severe storm patterns routinely disrupt air service and rivers seasonally evolve into ice roads.

Alaska's waters provide essential travel corridors year round. Many rural citizens, particularly in southwest Alaska, live in small, isolated villages stretched along rivers, and depend on these networks of water connections for their everyday needs. Major rivers like the Yukon and Kuskokwim serve as critical arteries for transporting commercial fuel and goods to much of western Alaska throughout the summer months. Especially in more remote areas, Alaskans rely on these waters to access health care, goods, and services; recreate; and travel to hunting and fishing grounds. In winter, Alaska's rivers freeze into highways for snowmachine, dogsled, and all-terrain vehicle traffic, remaining a vital part of the State's transportation infrastructure that allows Alaskans to access vital goods and services. Alaska's rivers have functioned in this way for hundreds of years.

Because Alaska's rural villages are so isolated, residents in these communities also face economic challenges. Rural residents confront a formidable combination of high costs of living, little or no local tax base, fewer job opportunities, and limited earnings. Localized resource-based activities – such as local tourism and recreation-related jobs or small-scale mining, sport fishing, wildlife guiding, or trapping – often

provide an essential part of families' incomes and contribute to the economic activity of the region.

Alaska has an acute interest in retaining its management authority over water-based access routes and in crafting management decisions to account for local needs – needs that might be ignored or eclipsed by federal land management agencies with singular conservationist priorities and a national constituency. State regulators understand the unusual realities of life in Alaska and use that knowledge to design rules that consider local conditions, practices, and needs. But federal regulators – who may never even visit Alaska, let alone develop a nuanced understanding of the unique aspects of rural Alaskan life – lack this knowledge or focus. As a result, the nationwide regulations they impose can be ill-fitting for Alaska.

For example, in permitting hovercraft to operate on state waters, Alaska has prioritized opening its waters to meet the access and transportation needs of residents like Mr. Sturgeon, whom the Park Service apprehended for taking his hovercraft to hunting grounds. The federal government's national prohibition on hovercraft use might be sensible in Lower 48 parks where waters are used only for tourism and wilderness activities, but it is overbearing and harmful in Alaska, where, even in remote wilderness areas, citizens must use rivers for everyday transportation and to access necessities like food, fuel, and health care.

What is at stake here for Alaska, therefore, is not just a disagreement with the National Park Service

about permissible weekend recreation or the best method of routing tourists through national parks. Because "Alaska is different," *Sturgeon*, 136 S. Ct. at 1070, the State's continued management of its waters and lands is essential to maintain unencumbered access and meaningful use of Alaska's natural resources by its citizens.

B. Alaska's sovereign right to regulate, use, and manage its lands and waters is instrumental to Alaska's statehood and ANILCA's purpose.

Management and control of Alaska's natural resources is not only vital to its residents, but also lies at the heart of the State's sovereign identity. As this Court emphasized in its prior decision, a central motivation for Alaskans seeking statehood in 1956 was to allow the resource-rich territory to manage its own lands and waters. *Sturgeon*, 136 S. Ct. at 1064-65.

Before statehood, Alaska benefitted little from the extraction of its minerals or from the fur trade and fishing industries. Congress, not Alaska's territorial government, owned nearly all the land and had most of the authority over land laws, natural resources management, and fiscal matters. Terrence M. Cole, *Blinded by Riches: The Permanent Funding Problem and the Prudhoe Bay Effect*, Inst. of Soc. and Econ. Research, Jan. 2004.[2] Mining taxes were low and thus contributed little, and "only a tiny fraction of the wealth from

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[2] Available at http://www.iser.uaa.alaska.edu/Publications/blindedbyriches.pdf, at 33.

the salmon industry ever directly touched Alaska's shores." *Id.* at 36; *see also id.* at 50-52.

When delegates gathered in 1955 to draft the Alaska Constitution, they expected an enormous grant of land and minerals from Congress at statehood to sustain the new state. The delegates "were uniform in their belief that Alaska's natural resources had been 'locked up' and devalued by the negligent actions of the federal government and absentee owners," and that the careful development of Alaska's resources "spelled the difference between a future of plenty or of poverty." Gerald A. McBeath, The Alaska State Constitution 159 (2011).

Members of the convention's resources committee also acknowledged the difficulty of reconciling the desire to develop Alaska's resources with the need to avoid the resource exploitation of the past. Victor Fischer, Alaska's Constitutional Convention 132-33 (1975). The delegates ultimately drafted an entire constitutional article directing the State to practice prudent resource development that would most benefit all Alaskans. Article VIII recognized the critical importance to the State of thoughtful, internal management of Alaska's resources, and commanded that Alaska's resources be reserved to the people "for maximum use consistent with the public interest" and providing for free access to Alaska's navigable or public waters. Alaska Const. art. VIII, §§ 1, 14. Alaska's new constitution then served as the basis for subsequent statehood petitions to Congress.

Congress, concerned that Alaska would not otherwise be able to raise sufficient revenue to carry out the responsibilities of statehood, gave it 103 million acres of land and mineral rights to fund self-governance. Alaska Statehood Act, § 6(a), (b), (i), 72 Stat. 340, 342. "The primary purpose of the statehood land grants . . . was to ensure the economic and social well-being of the new state." *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). Through these land grants, Congress recognized that Alaska stood ready, willing, and able to manage its resources. It relinquished federal control of Alaska's resources to the people who best understood the State's needs – Alaskans.

As this Court recognized, under the terms of the Submerged Lands Act and the constitutional equal footing doctrine, at statehood Alaska "gained 'title to and ownership of the lands beneath navigable waters' within the State, in addition to 'the natural resources within such lands and waters,' including 'the right and power to manage, administer, lease, develop, and use the said lands and natural resources.'" *Sturgeon*, 136 S. Ct. at 1065 (quoting § 3(a), 67 Stat. 30, 43 U.S.C. § 1311(a); § 6(m), 72 Stat. 343)). Only once its ability to control and manage the Sate's lands and waters was assured could Alaska begin its journey toward self-sufficiency and prosperity.

C. ANILCA's requirement that state lands be treated differently from federal lands protects Alaska's sovereign rights.

Twenty-one years after statehood, Congress passed ANILCA, reserving over 100 million acres of federal land in Alaska – an area larger than California – for the primary purposes of conservation and protection. 16 U.S.C. § 3101 *et seq*. Vast swaths of Alaska's new and expanded national parks, wildlife refuges, wild and scenic rivers, national trails, wilderness preservation systems, and national forest monuments were organized into CSUs managed by different federal land management agencies. 16 U.S.C. § 3102(4). Roughly 40% of Alaska now falls within an ANILCA conservation system unit, and Alaska's National Parks now make up two-thirds of the entire National Park System.

While ANILCA reserved massive amounts of land – significantly limiting the possibility for Alaska's future economic development – it also included provisions meant to protect Alaska's authority. Congress's statement of purpose acknowledges ANILCA's twin goals: to protect the national interest in scenic, natural, cultural, and environmental values on public lands in Alaska, but also to continue to "provide[ ] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d).

Congress protected Alaska's ability to direct the use of its own lands and waters by expressly stating

that non-federal "lands" – defined to include state waters as well as uplands – falling within newly expanded park boundaries would not be regulated as if they were federally owned. 16 U.S.C. §§ 3102(1), 3103(c) (providing non-federal lands are not "subject to the regulations applicable solely to [federal lands] within such units"). By the time ANILCA was passed, the State, private landowners, and Alaska Native Corporations had existing ownership interests in lands and waters across Alaska, so the federal areas ANILCA created encapsulated these non-federal areas into islands located within CSUs. Section 103(c) assures Alaska's sovereign authority to manage its waters and lands by excluding from CSUs those non-federal lands that happen to be located within unit boundaries. 16 U.S.C. §§ 3103(c), 3102(1), (3)(b)-(c), (11). This subsection further provides that, should the federal government wish to regulate non-public lands as part of a system unit, it must first acquire them; only then may the new lands become part of the unit and "be administered accordingly." 16 U.S.C. § 3103(c). By removing these non-federal lands and waters from the reach of the extensive regulatory regime applicable to federally owned parklands nationwide and drawing hard boundaries between how the different categories of lands should be treated, Section 103(c) limits federal jurisdiction and protects against abuse of federal regulatory power.

Now, for the second time, the Ninth Circuit nullified that guarantee, awarding the Park Service – and presumably other federal land management agencies

– broad authority to regulate state waters as federal lands. The Ninth Circuit's decision endorses further federalization of state-owned resources and subjects Alaskans to federal regulatory control in a manner that Congress neither authorized nor intended. Congress's careful balance between its dual goals of conservation and local control, and Alaska's longstanding sovereign right to manage its lands and resources, now lie in peril.

II. The Ninth Circuit's contortion of the federal reserved water rights doctrine threatens Alaska's political and economic sovereignty.

A. The Ninth Circuit's decision on remand disregards this Court's direction to construe ANILCA to protect Alaska's sovereignty and respect its uniqueness.

In 2016, this Court articulated governing principles for how to evaluate ANILCA and the Park Service's attempt to exercise management and control within CSUs. This Court reviewed Alaska's history, stressing that the Alaska Statehood Act, Alaska Native Claims Settlement Act, and ANILCA all reflect Congressional recognition that the proper state-federal balance was crucial to Alaska's economic health and prosperity. *Sturgeon*, 136 S. Ct. at 1064-66, 1070-71. The Court explained how ANILCA balanced the goals of conservation and local control. *Id.* at 1066 (quoting 16 U.S.C. § 3101(d)). And it discussed the "numerous Alaska-specific exceptions to the Park Service's

general authority over federally managed preservation areas" that are "woven throughout ANILCA," reflecting Congress's delicate balance. *Id.* at 1070-71. As this Court recognized, numerous aspects of ANILCA reinforce the importance of Alaska's difference and sovereignty – specifying, for example, that the Park Service cannot prohibit, even on federal lands, "certain activities of particular importance to Alaskans." *Sturgeon*, 136 S. Ct. at 1066 (citing 16 U.S.C. §§ 3170(a), 3201); *see also id.* at 1070-71 (citing 94 Stat. 2393, 16 U.S.C. §§ 3121(b), 3201).

Although the Court did not reach the question that the Ninth Circuit now has decided – whether the Nation River qualifies as "public lands" within the meaning of ANILCA, allowing broad federal management and regulation – its opinion stressed that "ANILCA repeatedly recognizes that Alaska is different" from other states, because of its majestic terrain and remoteness, the importance of Native Alaskan and subsistence values to the state, and its heightened need for state-managed resource development and use. *Id.* at 1070. ANILCA reflects "the simple truth that Alaska is often the exception, not the rule," and the law "contemplates the possibility that all the land within the boundaries of conservation system units in Alaska may be treated differently from federally managed preservation areas across the country, and that 'non-public' lands within the boundaries of those units may be treated differently from 'public' lands within the unit." *Id.* Applying these principles, this Court reversed the Ninth Circuit's initial reading of the

statute, calling it a "contorted and counterintuitive" reading of the statute because it was inconsistent with Congress's special solicitude for local control. *Id.* at 1071-72.

But on remand the Ninth Circuit again read ANILCA to erase distinctions between public and non-public lands and to eliminate state control in favor of national oversight. By holding that ANILCA transforms countless Alaskan navigable waters into federal lands, the Ninth Circuit once again endorsed a legal theory that subjects Alaska to plenary federal control. The Ninth Circuit's opinion lacks this Court's attention to principles of sovereignty and local control. It also contravenes this Court's legal precedents, ANILCA's text, and Congress's intent.

B. The Ninth Circuit's redefinition of the federal reserved water rights doctrine disregards this Court's precedents and tramples on state sovereignty.

Whether the Nation River qualifies as "public lands" in ANILCA is a legal issue that "touch[es] on vital issues of state sovereignty." *Id.* at 1072. ANILCA Section 103(c) imposes hard limits on the federal government's ability to regulate non-public lands, specifying that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). The Ninth Circuit concluded that the Nation

River – a navigable waterway owned and traditionally regulated by the State – qualifies as "public lands" because Congress implicitly reserved an undefined and unquantified level of instream flow when it created the Yukon-Charley preserve. This stretches the federal reserved water rights doctrine beyond all recognition. It also ignores Congress's decision to craft ANILCA to protect Alaska's sovereignty. Neither Congress's direction nor this Court's cases support the Ninth Circuit's conclusion.

1. The Ninth Circuit's decision conflicts with this Court's water rights jurisprudence.

The Ninth Circuit held that the United States has an "implied reservation of water rights [in the Nation River], rendering the river public lands." Pet. App. 19a. The court determined that "non-public land is still subject to [regulations applicable only to public lands] if the United States retains an interest in it because the land is public to the extent of the interest." Pet. App. 8a. It acknowledged that the State holds title to the submerged lands at issue, but held that the United States retained a reserved interest in the waters flowing above the submerged lands, such that the waters are public lands under ANILCA. That holding profoundly distorts the reserved water rights doctrine and the equal footing doctrine.

To reach its conclusion, the Ninth Circuit relied on a muddled and distinguishable circuit precedent. The

Ninth Circuit's "*Katie John*" decisions concerned only subsistence activities under ANILCA's Title VIII, which are not now and have never been at issue in this case.[3] In *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) [*Katie John I*], the Ninth Circuit held that "public lands include some specific navigable waters as a result of reserved water rights" – but only for the sole purpose of administering ANILCA's rural subsistence priority under a unique statutory title. *Id.* at 704. Indeed, the court explicitly cautioned that its holding was limited to those portions of ANILCA "necessary to give meaning to [ANILCA's] purpose of providing an opportunity for a subsistence way of life." *Id.* at 702 n.9. The *Katie John I* court remained convinced that "ANILCA does not support [] a complete assertion of federal control" over Alaska's navigable waters. *Id.* at 704. In broadening *Katie John* well beyond the subsistence context, the Ninth Circuit now has embraced that federal takeover. It was wrong to do so.

Under this Court's jurisprudence, a federal reserved water right is a limited, non-ownership right to use or preserve a specific volume of water. When the federal government withdraws and reserves lands for a public purpose, such as creating a national park, it "by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the

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[3] Nor has any party to this case challenged the federal subsistence regulations that effectuate Title VIII's subsistence priority. Alaska supports the subsistence regulations – but this does not and need not require the State to cede control of its navigable waters to the federal government for all purposes.

purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). This Court has strictly limited the scope of this doctrine: it applies only to "that *amount of water* necessary to fulfill the purpose of the reservation, no more." *Id.* (emphasis added).

Thus, in *Cappaert*, this Court examined the extent of the federal government's reserved water rights in the Devil's Hole National Monument, a deep limestone cavern in Nevada containing a subterranean pool home to a rare and endangered pupfish. In establishing the national monument, Congress's direction to give special protection to the pool and the fish living in it established a federal reserved water right – but the government's interest extended only to preserve the exact amount of water necessary to keep the fish alive. *Id.* at 141. To ensure that the doctrine remains limited to the amount of water absolutely necessary to fulfill the government's purposes – a crucial check on federal authority – courts applying the doctrine "carefully examine[] both the asserted water right and the specific purposes for which the land was reserved, and [must] conclude[] that without the water the purposes of the reservation would be entirely defeated." *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

The Ninth Circuit did not adhere to this limiting principle. It made no attempt to constrain the National Park Service's reserved water rights interest to the minimum amount of water necessary to prevent the purposes of the Yukon-Charley reservation from being entirely defeated. Instead, the court decided that the Park Service's reserved water right extended to

prevent any water use that would merely *impact* the purposes of the reservation. Pet. App. 17a-18a. This novel redefinition of federal reserved water rights vastly expands the doctrine and completely defeats Alaska's rights in its waters just because there may be *some* federal interest in *some* use of the water. And the Ninth Circuit's analysis no longer treats the reserved water rights doctrine as concerning use of a particular amount of water, as this Court has required. Instead, the Ninth Circuit has invoked the doctrine to justify a wholesale grant of federal management authority over Alaska's navigable waters. This is a startling expansion of the doctrine, and one with no foundation in this Court's jurisprudence.

Even that holding would not have been enough, on its own, to entitle the federal government to regulate navigable waters that flow through CSUs. But the Ninth Circuit took another remarkable step and ruled that the United States has "title" to the water that is subject to reserved water rights. This was necessary in order to transform state waters into federal lands under ANILCA's definition section. ANILCA authorizes the federal government to regulate "public lands," which it defines as "[f]ederal lands." 16 U.S.C. § 3102(3). "Federal land" in turn is defined as "lands the *title* to which is in the United States." *Id.* § 3102(2) (emphasis added). And "land" includes "lands, waters, and interests therein." *Id.* § 3102(1). But the United States does not hold "title" to navigable waters as to which it has reserved water rights, let alone to the lands underlying Alaska's navigable waters. The Ninth

Circuit conceded that "reserved water rights are not a 'title' interest . . . in a narrow, technical sense," Pet. App. 16a (internal quotes omitted), but found "a vested interest in the water" to be good enough. *Id.* at 17a. It is not. If Congress intended that a non-title "interest" in water could make a river "public lands" that are fully subject to the power of federal regulation, it would have written the statute to say that.

Other provisions of ANILCA confirm that Congress did not intend that a federal usufructuary right – an interest far less than title – would transform entire lands and rivers into "public land," enabling broad federal regulation for all purposes. One example is that Section 103(c) limits the ability of the Secretary to regulate state, private, or other non-federal lands unless it purchases or otherwise acquires them. Yet the Ninth Circuit now gives the Park Service this right to regulate state waters without any purchase, compensation, or acquiescence from the State. *Cf.* 16 U.S.C. § 3192a.

The Ninth Circuit's ruling subverts not only ANILCA, but also the constitutional equal footing doctrine, the Submerged Lands Act, and the Alaska Statehood Act. At statehood, Alaska took title to its submerged lands as an "essential attribute" of state sovereignty, *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987), which Congress formally recognized in the Submerged Lands Act and the Statehood Act, *see* 43 U.S.C. § 1311(a) (incorporated into the Alaska Statehood Act, 72 Stat. 343 § 6(m) (1958)). Along with title to the submerged lands, the State

received management power over the navigable waters themselves, 16 U.S.C. § 3210(b), and over the fish located in the waters. *See* 43 U.S.C. § 1311(a) (confirming and establishing state ownership and management of "the natural resources within such lands and waters"); 43 U.S.C. § 1301(e) (defining "natural resources" to include fish). Title to the lands underlying navigable waters is important to a state's sovereign authority and obligation to regulate waters in trust for the people for navigation, commerce, and fishing. *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). That is particularly true here given Alaska's unique history and the realities of life for many of its residents.

Although navigable waters themselves are not usually considered subject to traditional title ownership, they run together with the submerged lands they overlie; title to the bed of navigable waters "necessarily carries with it control over the waters above them." *Id.* Thus, the Submerged Lands Act recognized state assumption of both "submerged lands and waters." *United States v. California*, 436 U.S. 32, 37 (1978). Ever since statehood, then, Alaska has had sovereign control and management authority over its waters. *See also PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012) (explaining that under equal footing doctrine, "[u]pon statehood, the State gains title within its borders to the beds of waters then navigable" as a matter of constitutional grace, and may "allocate and govern those lands according to state law" as sovereign).

The Ninth Circuit did not and could not explain how a federal reserved water right eclipses the State's

sovereign interests in managing its waters. Had Congress meant to grant the Park Service broad regulatory power over Alaska's navigable waters superseding Alaska's sovereign ownership and control, it would have done so clearly and directly. Indeed, this Court's cases require that such interference with state control must be unambiguous and plain – another fundamental legal principle that the Ninth Circuit ignored.

2. The Ninth Circuit's decision conflicts with this Court's clear statement cases.

The Ninth Circuit not only distorted this Court's water rights jurisprudence, it also ignored the legal doctrine that functions as a crucial check on the precise power transfer that the Ninth Circuit endorsed: the clear statement doctrine.

"Congress does not exercise lightly" the "extraordinary power" to "legislate in areas traditionally regulated by the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The clear statement doctrine effectuates this principle, serving as a necessary safeguard against unwarranted federal assumption of power. Under the doctrine, courts will not interpret a statute to "alter the usual constitutional balance between the States and the Federal Government" unless Congress has made "its intention to do so unmistakably clear in the language of the statute." Congressional intent to infringe on state sovereignty must be "plain to anyone reading [it]" through a "clear and manifest statement."

Gregory, 501 U.S. at 467; *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (internal quotation marks omitted). This rule "acknowledge[s] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461. In violation of these principles, the Ninth Circuit's reading of ANILCA significantly intrudes upon Alaska's sovereignty without clear Congressional intent to alter the traditional federal-state balance over management of navigable waters.

The clear statement doctrine applies wherever federal regulation "would result in a significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (*SWANCC*). This is unquestionably true here, for the expansive regulatory jurisdiction the Ninth Circuit appears to have created will be used to significantly impair Alaska's "traditional and primary power over land and water use" by forcibly removing Alaska's control of its submerged lands and navigable waters. *Rapanos*, 547 U.S. at 738; *see also SWANCC*, 531 U.S. at 172-73 (noting that clear statement requirement is especially crucial "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power"). But the Ninth Circuit made no effort to apply the doctrine.

Had the Ninth Circuit applied these principles, it could not have reached the result it did, for ANILCA

does not contain any statement, much less the required clear statement, of Congressional intent to force Alaska to cede control over its waters to the federal government. Indeed, the text of ANILCA, hundreds of pages long, does not mention navigable waters or reserved water rights at all. Nor does its definition of "public lands" as "lands, waters, and interests therein" the "title to which is in the United States," clearly and manifestly include navigable waters, because the government does not hold "title" either to a non-possessory right to preserve instream flows or to the underlying submerged lands. In fact, Congress expressed the intent to *exclude* navigable waters from the definition of "public lands," by explicitly exempting all "lands . . . granted to the Territory of Alaska or the State under any other provision of Federal law." 16 U.S.C. § 3102(3)(A).

The Ninth Circuit's failures to correctly apply either the reserved water rights doctrine or the clear statement doctrine combine to create a particularly damaging legal landscape for states. In one blow, the Ninth Circuit has dramatically expanded the scope of federal regulatory authority and overridden local control of state waters, while simultaneously sweeping away the clear statement rule's protections against federal usurpation of state authority.

C. The Ninth Circuit's decision threatens states' authority under other federal statutes and in waters outside CSU boundaries.

Alaska is not the only sovereign whose control over its waters is threatened by the Ninth Circuit's decision. It also threatens other states and Native Tribes within the Circuit because ANILCA's definition of "public lands" appears verbatim in numerous other public lands statutes, and because the Ninth Circuit's decision appears to permit federal regulation of state-owned waters appurtenant to federal lands and waters.

When this Court last considered this case, it considered a statutory construction question applicable only to Alaska. But the Ninth Circuit's reserved water rights rationale is not limited to waters lying within the boundaries of ANILCA units in Alaska. The federal reserved water rights doctrine is judicially created and applies across the nation. And as Mr. Sturgeon points out, ANILCA's definition section – which the Ninth Circuit relied on to hold that Alaska's navigable waters are "public lands" – appears verbatim in numerous other public lands statutes across the west. Pet. 26-27 & n.1. The Ninth Circuit's rationale therefore invites the federal government to usurp control of navigable waters in parks and federal areas throughout the Circuit. This Court should not allow the Circuit's legal errors to compromise the sovereign interests of states across the west.

Making matters worse, the federal government's newly granted management authority also may extend well beyond the geographic scope of waters physically running through federal areas. Under the Ninth Circuit's "immensely broad" concept of appurtenance, the government's reserved water right gives it control of not just the portions of the navigable waterway that lie inside CSU boundaries, but also *other* waters appurtenant to the reserved federal land. *John v. United States*, 720 F.3d 1214, 1229-31 (9th Cir. 2013). The potential scope of the government management authority over what were previously clearly Alaska's waters now includes "all the bodies of water on which the United States' reserved rights could at some point be enforced – *i.e.*, those waters that are or may become necessary to fulfill the primary purposes of the federal reservation." *Id.* The scope of this holding is breathtaking, possibly including most or all of Alaska's waters – and without any clear congressional intent to deprive Alaska over those submerged lands and waters.

If allowed to stand, the Ninth Circuit's opinion could thus result in a federal takeover of state waters across the west – including waters that are not located inside the boundary of federal areas. This Court should not permit this to happen. It should grant Mr. Sturgeon's petition and ensure that state sovereignty is respected in the Ninth Circuit as this Court and Congress have directed.

CONCLUSION

For all these reasons, this Court should grant the petition.

Respectfully submitted,

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No. 17-949

IN THE

Supreme Court of the United States

JOHN STURGEON, PETITIONER

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AND CENTRAL NEW YORK FAIR BUSINESS ASSOCATION AS AMICI CURIAE SUPPORTING PETITIONER

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Interest of the *Amici Curiae*

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. Central New York Fair Business Association (CNYFBA) is a member organization of CERA and is incorporated as a non-profit in Oneida, New York. CERF and CNYFBA are primarily writing this *amici curiae* brief to explain why the federal reserved rights doctrine cannot be valid if the structure of the Constitution was primarily intended to protect the individual rights of the people to self-governance at both the state and national level.[1]

CERF submits this *amici curiae* brief to add the perspective of its members that the Constitution should apply to all persons in the United States. CERF firmly believes that the United States government should be promoting the interests of all of its citizens on an equal basis. Accompanying this *amici curiae* brief is a motion to lodge two newly located historic documents CERF believes have never been seen by this Court. The memorandum "Embargo on the Upper Rio Grande"

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amici curiae*, CERF, its members or its parent CERA's members including Central New York Fair Business, or its counsel have made any monetary contribution to the preparation or submission of this brief.

explains how the federal reserved water rights doctrine was created through deliberate fraud by the United States. This is a comprehensive memorandum with many exhibits. The second memorandum "Federal Irrigation Water Rights" explains how all waters can be subjected to federal authority. Counsel will attempt to explain how the fraud perpetrated on the Rio Grande from December 1896 forward to expand the navigation servitude authority has resulted in allowing the Commerce Clause to confront the public trust doctrine authority of the State of Alaska and Mr. Sturgeon in this case. Both parties have consented by letter to the filing of this *amici curiae* brief.

Summary of the Argument

This case is all about the latest expansion of the federal reserved water rights doctrine established in *Winters v. United States*, 207 U.S. 564 (1908). The federal reserved waters rights doctrine was created, according to the documents located by CERF in a presidential library that accompany this brief, by the United States intentionally manipulating and intermixing the commercial authority of domestic law from the navigation servitude with the war power of embargo on the Rio Grande in December 1895. Not only did the United States deliberately not tell the truth to this Court in the Rio Grande Dam and Irrigation cases, the United States Department of Justice counseled the Reclamation Service to not tell anyone, including members of Congress, the truth of the situation. Almost 30 years after perpetrating the fraud, the attorney Ottamar Hamele, appointed as special counsel to the Rio Grande Commission in 1924 read his memorandum

on the "Embargo of the Upper Rio Grande" at the beginning of the discussions to form the Rio Grande Compact between the States of Colorado, New Mexico and Texas. The United States required all three States to accept the fact that the fraud had occurred and base their positions for the Compact upon it. With the three States as co-conspirators to the original fraud both the public trust responsibilities of the States and the ownership of the water became unsettled.

The Hamele Memorandum and the Ethelbert Ward Memorandum of 1930 titled "Federal Irrigation Water Rights" prove that the federal reserved water rights doctrine was not created for the benefit of the Indians. Neither document even mentions Indians or Indian tribes. One of many facts the attorney for CERF knows was left out of the Hamele memorandum was how Indians were directly and deliberately used to further the federal fraud on the Rio Grande. Native Americans were rounded up and separated from their families for several years from both the Mescalero Apache reservation and Isleta Pueblo and placed at the Leasburg and Elephant Butte dam sites of the Rio Grande Company. The Army of the United States guarded these Indians preventing them from going home and the Company from being able to construct the dams within the time allowed by the 1891 Act of Congress.[2] The "trust relationship" established over the Indians and the national interest to protect the navigation servitude that becomes the basis of the federal reserved rights doctrine in *United States v. Winans*, 198 U.S. 371 (1906) and *Winters* was nothing

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[2] CERF has copies of the General Land Office Tract Book records from the Federal Center of the National Archives in Denver, Colorado that prove these facts.

but a deliberately constructed federal fabrication that this Court accepted as being in the national interest and made into law. The Ninth Circuit has just further expanded on this fabrication to claim the doctrine is based on the Commerce Clause.

While the Rehnquist Court actively looked for a solution to the grossly expanding federal authority, only since *Carcieri v. Salazar*, 555 U.S. 379 (2008) has this Court begun to look closer at the federal political interests presented as legal arguments. The Departments of Justice and Interior have deliberately punished this Court for attempting to reel in one small aspect of their plenary authority in defining the term Indian under the Indian Reorganization Act. The Departments are trying to intimidate this Court into backing down because they know that their plenary authority is all based on keeping the Indians wards of the national government. Lots of time has passed and this one body of law has grown many heads or legal doctrines. All of these legal doctrines are from one common source—the fact that this Court has not enforced that all people are equal citizens. This Court does not need a Herculean effort to defeat this hydra. This Court just needs to believe that the Constitution is still relevant and choose to apply it with the Civil War Amendments against the monstrous fraud of the federal reserved water rights doctrine.

ARGUMENT

This Court this term has already balked at challenging the taking of lands into trust for Indians in New York State, an original colony, and allowing those lands to be treated as federal "Indian country" territory where no federal territory has ever existed under the

Constitution. While CERF and CNYFBA greatly appreciated the dissent of Justice Thomas to this result, the necessity of correcting its prior opinions allowing the plenary authority over Indians was not accepted by enough Justices to grant the petition to hear the case. CERF does believe that it is easier to articulate the concerns against plenary authority over Indians as wards in a water case than in a land case. The reason for this is the way the public trust doctrine was defined as a matter of separation of powers in *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845) and other old water cases. Because of the large waterways and extensive coastline in the Eastern states the division of authority over the waterways was considered and defined long before our Civil War. The early water decisions were also some of the earliest Commerce Clause decisions. This case is the result of the Ninth Circuit choosing to ignore the old water law cases and further expand the fraudulently made federal reserved water rights doctrine.

I. THE FRAUDULENT DOCTRINE OF FEDERAL RESERVED WATER RIGHTS.

A. The Fraud on the Rio Grande

After the Civil War, Congress changed federal Indian policy. The 1871 policy ended treaty making with the Indian tribes. This formally ended the assimilation policy of the Northwest Ordinance and began a much harsher direct war power policy toward the Indians. See 25 U.S.C. § 71, 1 Rev. Stat. § 441 and § 442. *See also U.S. v. Lara*, 541 U.S. 193, 201 (2004). The separate racial classification of "Indian" from *Dred Scott* v. Sandford, 60 U.S. 393 (1857) was deliberately preserved in the Indian Policy of 1871 as codified in the

Revised Statutes of the Reconstruction era. The Indian policy of 1871 was based on all Indians and Indian tribes as a race being potential belligerents against the authority of the United States. This change happened because so many Indian tribes raised hostilities during the Civil War. Many Indian tribes formed alliances with the Confederate States. *See Holden v. Joy*, 112 U.S. 94 (1872). This codification of the Reconstruction power over Indians preserved the territorial war powers used to fight the Civil War and to Reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) p. 470-8. This was exactly what Secretary of War Edwin Stanton argued for to forever prevent another civil war. Under the 1871 policy even if an Indian left the reservation of territorial land made for his tribe and resided in town as a member of American society, he was deemed to be under the complete authority of Congress as an undomesticated person not capable of exercising the responsibilities of a citizen. Only Congress could change his status and grant citizenship *See Elk v. Wilkins*, 112 U.S. 94 (1884).

By the 1880's senior members of Congress were intentionally going around the 1871 Indian policy and trying to fulfill the promises that had been made to friendly Indian tribes under the original assimilation policy. *See Nebraska v. Parker*, 136 S.Ct. 1072 (2016). This attempt to return to the assimilation policy was incorporated into the Dawes or General Allotment Act of 1887. At the same time, many other members of Congress were more than hesitating to relinquish the essentially unlimited authority they possessed over Indians from the 1871 policy. This was the creation of the schizophrenic federal Indian policy that still exists today.

It was not only Congress that was beginning to

relish this virtually unlimited authority over the Indians and explore new possibilities of applying it. According to the historical documents from the Rio Grande, multiple federal attorneys in the Departments of State, Interior and War were also seeing the possibilities. Whether it was the attorney bureaucrats or their Secretary bosses that wanted to expand this power, federal officials at the upper levels were beginning to understand that the application of this power over the Indians could be used and developed for other purposes.

The Memorandum titled "The Embargo on the Upper Rio Grande" by Ottamar Hamele is a confession explaining what the United States did on the Rio Grande to cheat the Rio Grande Dam and Irrigation Company out of the right of way it had been granted under the statute of March 3, 1891, 26 Stat. 1095, to build the Elephant Butte Dam on February 1, 1895. The memorandum explains step by step how the Mexican complaints were denied but then apparently applied on moral grounds.[3] The result was a letter from the Secretary of the Interior dated December 5, 1896 to the General Land Office declaring an embargo and suspending all further applications for rights of way in Colorado and New Mexico. While the Secretaries of State, Interior and War all are named in this Memorandum as well as the Attorney General, no mention is made of any contact or decision of the President or any member of Congress to authorize the suspension of the Congressional statute of March 3,

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[3] The Hamele Memorandum has no page numbers. It is divided into sections by captions explaining the various actions that were taken. The section relating to the above statement is "Agreement of May 6, 1896."

1891, 26 Stat. 1095. The claimed justification for the embargo is to negotiate a future water treaty with Mexico. When the treaty negotiations faltered, the Secretary of State questioned whether the Rio Grande was a navigable river and requests another Attorney General's opinion on the subject. Even with the change of presidential administration the opinion is issued assuming the Rio Grande is a navigable river at Elephant Butte despite all of the upstream diversions of water that had already greatly depleted its flow. As described in the section entitled "Litigation with the Rio Grande Dam and Irrigation Company" twice the trial court and the Territorial Supreme Court dismissed the federal complaint finding that the Rio Grande was not navigable. Twice, the United States Supreme Court reversed requiring that more evidence be taken in the case to give the United States additional opportunities to stop the construction. Finally, the United States changed its position and argued that the right of way to build the dam had only been granted for 5 years and that time had expired. This argument was finally accepted and ended the possibility of the construction of the storage dam by the Company.

As the Hamele memorandum explains just a few years later the United States announced it would build a larger water storage dam at Engle, New Mexico attached to the Elephant Butte bluff. Only this federal reclamation project now came attached with all the changes in federal law deliberately manufactured by the United States. Most notably, that the United States claimed actual ownership of all of the unappropriated water of the Rio Grande for its project as detailed in the memorandum and its attachments. Lastly, although nicely stated, the end of the Hamele memorandum explains that the Rio Grande Compact Commission was

convened and agreed to by the three States as the only means by which the United States would finally release the embargo order on the Rio Grande. The States had no choice but to accept the terms of the United States as to how their rights had been altered by the fraud and could potentially lose their water rights if they opposed the de facto fraud of the United States.

Although, the facts are a bit different in this case from Alaska the exact same pattern was used. The federal government got involved in protecting the area in Alaska promising that all it was bringing was a greater level of certainty that would further protect all interests. Then some federal bureaucrat or group of them started making noise about the hovercraft business. There was no evidence that any harm was occurring that required federal attention. This was another opportunity to assert greater federal control and further expand the navigation servitude doctrine that caught the attention of the federal attorneys. This business owner has no idea and has no right to find out why his business has been targeted any more than the owners of the Rio Grande Company did. Nothing has changed. This problem just gets more common as the federal government gains more authority to disrupt justifiable expectations. If the National Park Service wins it could change its mind tomorrow and allow hovercraft operations, only it would set all of the rules just like on the Rio Grande.

B. The Abuse of the Navigation Servitude

While the admitted to facts regarding the embargo on the Rio Grande are revealing they do not explain how the federal attorneys turned the navigation argument that failed in the Rio Grande dam cases into the completely unaccountable power it has become

today to create the present case. It requires a reading of the second memorandum on Federal Irrigation Water Rights to see just how abusive the navigation doctrine became by being combined with the war power to issue the embargo on the Rio Grande. While counsel could contest the various points made in this memorandum, for purposes of this case at the petition stage counsel will not do so but will allow the written memorandum to speak for itself. It is more important that this Court realize what the claimed federal authority really is. Counsel reminds this Court that this is a Memorandum dated January 22, 1930 and that the United States undoubtedly claims more than this today. The reasoning in the 1930 memorandum is more detailed than the reasoning applied by the Ninth Circuit. The difference is that the 1930 memorandum tries to justify or interpret how separate constitutional powers were combined from the fraud on the Rio Grande to claim ownership of all water while the Ninth Circuit erroneously assumes that the Commerce power always included these other constitutional powers.

Attorney Ethelbert Ward states that the federal reserved water rights doctrine was established when this Court opined that "Although this power of changing the common law rule as to the stream within its domain undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress, a State by its legislation cannot destroy the right of the United States, as the owner of lands bordering on streams, to the continued flow of its water so far at least as may be necessary for the beneficial uses of the government property..." U.S. v. Rio Grande Dam and Irrigation Co., 174 U.S. 690, 703 (1899). See Memorandum titled "Federal Irrigation Water Rights" by Ethelbert Ward,

dated January 22, 1930, bottom of p. 3. As made clear by the exhibits to the Embargo of the Upper Rio Grande memorandum, the recognition by this Court of the rights of the United States as the owner of lands bordering on streams was immediately put into effect against the Territory of New Mexico. A claim to all of the waters of the Rio Grande within the Territory was made and filed to the State Engineer.

This memorandum on Federal Irrigation Water Rights goes much further than just asserting these rights within federal irrigation projects. The first sentence "The United States is the owner of the unappropriated waters in the non-navigable streams in the public land States of the arid West." sets the stage. As just stated above, the United States claimed all of the unappropriated waters of the Rio Grande even though they had argued in this Court that the Rio Grande was a navigable river. But to claim all of the unappropriated waters according to this analysis the United States also had to be claiming that the Rio Grande was non-navigable. The Ward memorandum explains how the United States can use either argument navigable or non-navigable to gain the same results on federal reserved rights. The reason is stated just before the quote from the Rio Grande dam case on p.3. "Even in the States where the appropriation system prevails, the United States continues to hold its land and waters as a riparian proprietor at common law."

In other words, the lawyers for the United States have determined that their interpretation of the law is not subject to challenge in any court of law or by Congress because they have the absolute right to treat the public land states as being continuously under the territorial war powers. If the territorial war powers can

be asserted against any State simply by saying it is for the Indians what is the difference in saying that the same power exists in a slightly different analysis?

This Court was absolutely complicit in allowing the general reserved rights doctrine established in *Dred Scott v. Sandford*, to remove the future state interests of New Mexico. Just like Congress and the line of Presidents from Ohio that had learned how Edwin Stanton had reserved great powers to the United States through the 1871 Indian Policy, this Court played along with the new federal game of asserting the retained war powers as domestic law. As stated in the Summary of the Argument section of the brief, Indians were literally kidnapped off of two reservations and forced to live at the two dam sites to prevent construction by the Rio Grande Company. Using the Indians was the means to this unlimited power. Of course, it did not take the United States or this Court long to expand federal power into other newly discovered reserved federal ownership rights through Indian treaties or claims to unmentioned water rights vesting when Indian reservations were established. The Ward memorandum sets out in exacting detail how every law and decision by this Court through 1930 can be interpreted by the federal attorneys to further this federal interest. "The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied, and could not be. United States v. Rio Grande Ditch & Irrigation Co., 174 U.S. 690, 702; United States v. Winans, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. Winters v. United States, 207 U.S. 564, 577 (1908)." Ward Memorandum at p.8. The Ward memorandum then

continues into how Section 8 of the Reclamation Act also does not change any of the federal reserved water rights.

This Court knowingly and deliberately broke the rule of law as requested by the federal attorneys in the Rio Grande Dam cases. No longer did Congress exclusively exercise plenary territorial war power authority to determine the processes and rights of persons in the territories until those territories become States. *See American Insurance Co. v. Canter*, 26 U.S. 511 (1828). From 1897 forward, any Secretary wielded even greater territorial war powers than Congress because they were completely unaccountable to the people or companies they harmed by altering legal processes. It was highly unlikely that anyone would ever find out how their justifiable expectations to a government process were altered because the information from the federal attorneys was and is privileged unless the documents have been placed into the public record in the National Archives. This was an unforeseen accident that these two memoranda after almost 100 years have now been found in released public files and can be used to question the very basis of the federal reserved rights doctrine.

As the Sturgeon facts make clear, Congress specifically did not authorize the National Park Service to claim these same federal reserved rights on the waterways in Alaska where the plaintiff operates his hovercraft. Again, the federal attorneys' position is to present this latest expansion of the federal reserved rights doctrine to this Court and receive its tacit approval.

II. IS THIS COURT WILLING TO STEP UP TO IMPOSE ANY LIMIT ON FEDERAL AUTHORITY?

The law we inherited from Great Britain completely separated the war powers from the domestic law. Either an area was under military jurisdiction or it was under civil jurisdiction. This was the most direct way to prevent the government authority to wage war from influencing or affecting the domestic authority to promote self-governance. All of the Colonies prior to the Revolutionary War were classified as British territories under military jurisdiction. Your individual status was determined by where and to whom you were born as designated by British law. Under British law today there is still no legal means to judicially transition those born under the territorial military status of a Colony to becoming equal in status to those born within the British Isles. British law establishes different types of British citizenship depending on where and to whom you were born. But Britain has also expanded the role of its domestic courts to hear both civil and military crimes. By placing the same judges and tribunals to decide the distinct types of law, the courts and the people are constantly reminded of the differences between military and civil statutes and the need to keep them separated. Great Britain and most of her former colonies have managed to preserve their individual rights as their system of governance has designated by keeping the war powers and domestic powers separated. Britain has found a workable separation of powers balance that has preserved individual liberty under their system. This Court must correct the prior law and find a way to separate the war powers from the domestic law again.

Defining and limiting the authority to wage war was seen by the Framers as one of the most difficult problems in designing the structure of the Constitution. One of the most prominent members of the Constitutional Convention, George Mason of Virginia, refused to sign the finished Constitution because he did not believe the document contained enough restriction on the federal authority to wage war given the slavery and Indian situations. These groups were situations because they were not "white." The authority to classify slaves as 3/5ths human and Indians not taxed as separate required treating them as potential enemies using military authority. These clauses also deliberately intermix the authority to wage war and the civil authority in order to create an opportunity for all people to become equal. From the beginning our Framers rejected the old British absolute classifications of an individuals status being decided at birth and attempted to create something new. Every person was to be allowed to employ their own talents to achieve whatever they made possible through their own work no matter whether they were born a slave, an Indian or an aristocrat. Even as slavery became the main cause of the Civil War the quest for equal protection or equal justice under the law grew as a principle and became the backbone of the Civil War Amendments.

The Framers of our Constitution because of this distinction in fundamental rights between the application of domestic and territorial law specifically required that Congress "dispose of the territories." Property Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States was defined by this Court as allowing the United States to retain territorial land only on a temporary basis in a case that determined that States owned the

bed and banks of a navigable waterway. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). The specific requirements set in that case became known as the American public trust doctrine. The public trust doctrine was meant to prevent the United States from being able to use the territorial war powers as permanent domestic law against the States and individuals. The main concept was that the federal government could exercise plenary power over a territory but that upon the formal creation of the territory by Congress certain powers and ownership over the water would vest in the future state. This insured that all States would be admitted on an equal footing with the existing states. Before the Civil War Amendments and the end of slavery this was the only way to enforce the Framer's view that all people had to be equal before the law.

The majority of the Framers believed that this deliberate intermixing of war and civil authorities was acceptable because they had designed a national government that made permanent the civil liberties and would require all "war or emergency" designations to be "temporary." They specifically applied this temporary versus permanent restriction in the Property Clause, Art. IV, Sec. 3, Cl. 2., to limit the federal authority to keep an area indefinitely under military jurisdiction by requiring the Congress to dispose of the territory. The Framers had also learned from British experience that government ownership of real property created jurisdictional issues and deliberately created the separate Enclave Clause for this reason. Similarly, they understood from British law that government ownership also implicated commercial activities that touched upon or used government property and separated commerce from the ownership

interests. These and other specific separation of power and checks and balances constraints were built into the Constitutional structure to prevent the war powers from being used as domestic authority. The Framers thought they had created a limited national government subject to a written statement of its authorities. In a separate Bill of Rights they imposed even more limitations on the national government and specifically reserved to the States and primarily the people all those powers not specifically conferred to the national government.

Today all of the constitutional constraints on government power are irrelevant because this Court has failed to enforce them for more than a hundred years. The attorneys for CERF and CNYFBA know the constitutional constraints have all failed because this Court will not protect the justifiable expectations of people to what they believed was their government. When the United States is allowed to reclassify the ground you are occupying or using exactly as described in the Hamele and Ward memoranda from being under domestic law to being under territorial war law, then you lose all of your rights in that area without ever knowing what even hit you. This is what has happened to Mr. Sturgeon. He has been blindsided by this asserted federal authority that claims the federal government can change the underlying basis of what law applies to the waterways. There are now enough people that feel that they have lost their rights and their government that Donald Trump, a total Washington outsider, was elected President of the United States.

The fact that the Ninth Circuit is now forcing the last frontier, Alaska, to succumb to the federal reserved power just like this Court did against New Mexico

more than 100 years ago will either end this fight or cause people to revolt. The people are very frustrated because there has been no explanation given as to what happened for them to lose their government. No wonder since the documents detailing the major changes have been deliberately removed from public view just like these two memoranda as to what really happened on the Rio Grande to create the federal reserved rights doctrine. Counsel for CERF was not searching for New Mexico water documents when she found these. What she was searching for were documents from federal attorney William H. Veeder, the greatest champion of the federal reserved rights doctrine and attorney for the United States intervention on behalf of the Indian tribes on the Colorado River. Counsel found several memoranda written by Veeder that make these memoranda on how the Rio Grande Dam cases were used appear very tame by comparison. Frankly, the Veeder memoranda are so inflammatory that counsel would hesitate to introduce them into any ongoing case.

III. THIS COURT CONTINUES TO AVOID ITS CONSTITUTIONAL ROLE

For more than 20 years the Citizens Equal Rights Foundation (CERF) has been presenting *amici curiae* briefs to this Court requesting that this Court reexamine its prior cases granting plenary authority to the Congress and Executive branch over Indians under current federal Indian policy. Two terms ago, in several opinions this Court called into question the continuing plenary authority. One of those cases was the earlier version of this case, *Sturgeon v. Frost*,136 S. Ct 1061 (2016). The Chief Justice himself warned the Ninth

Circuit Court of Appeals in the unanimous opinion that further expanding the federal reserved water rights doctrine would have great implications but did not articulate what those implications would be. The Ninth Circuit upon rehearing chose to ignore the warning and has greatly expanded the federal reserved water rights doctrine to now include full plenary authority under the Commerce Clause. Now this Court must either capitulate to this end of the state public trust doctrine over water as the Ninth Circuit has defined it or confront the claimed federal plenary authority over Indians that has expanded to this point. There is no place left in the Ninth Circuit decision for any claim of state sovereignty over water in Alaska if the reasoning of the Ninth Circuit stands.

Ultimately the question is one of separation of powers that depends on how this Court defines the concept of judicial review. Since the Civil War this Court has allowed federal attorneys to define the Constitution and spoon feed to the Justices the legal result they want in a decision. This Court has allowed lawyers representing the United States to define what is good or bad for the national government instead of this Court deciding what is best for preserving self-government and the rights of the people. This Court needs to be like an architectural board deliberately and carefully protecting the structure of the Constitution that literally keeps our civil rights and liberties intact. The utter failure of this Court has allowed a steady increase of federal authority across anything a federal attorney can claim as a federal interest. Former Justice Sandra Day O'Connor described this as the loss of individual liberty. There is no personal liberty when the Supreme Court always accepts that the federal government has an interest in any and all commercial

activities. Very few things that any person owns or does today are not products or services in commerce.

What counsel for CERF and CNYFBA really do not understand is why the liberals that say they respect civil rights and civil liberties cannot see that as long as the unlimited federal reserved rights doctrine is law that it can be used against any unsuspecting person to take away all of their rights without any notice or slightest warning. The owners of the Rio Grande Company were completely blindsided by the attack of the federal government when they believed and had been told they had received all the federal permission they needed to legally build the Elephant Butte dam. Counsel for CERF was blindsided when she was attacked for writing a new federalism argument through a federal demonstration project that allowed the State of New Mexico to use the Indian Child Welfare Act as the main guideline for all domestic relations law in New Mexico. Any property owner can be blindsided if a federal bureaucrat sees something of federal interest on their property. Or in this case, if an asserted federal interest is used to deliberately stop a successful business just because a federal bureaucrat represented by federal attorneys claims he has the authority to do so on navigable water in Alaska.

The ultimate blindside happened to persons of Japanese ancestry after the attack on Pearl Harbor. The 1871 Indian policy was copied by the United States military to figure out how to legally detain and remove persons of Japanese descent during World War II. It was no accident that the Japanese Relocation centers and detainment camps were located on current and former federal Indian reservations. As the Japanese found out, any person can be reclassified using the same federal authority to change a land or water

classification. Many cases filed by Japanese citizens challenged their treatment during the war. This Court upheld the military authority applied through the civil criminal laws against the Japanese citizens because of their race until the end of 1944 when it finally granted a *habeas corpus* petition. *See generally Ex Parte Mitsuye Endo*, 323 U.S. 283 (1944). We don't want to remember how the 1871 Indian policy was justified and upheld in principle in *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944). Nothing has changed.

This thinking is as crazy as believing that the federal Indian policy of 1871 that still underlies current federal Indian policy was defined and designed to help the Indians. As William Veeder himself found out, nothing is further from the truth.

This Court with the Civil War Amendments has had the ability to restore the rule of law and forever end the federal reserved rights doctrine by making all people equal before the law. This Court has just not had the inclination to do so.

Conclusion

This Court should accept the petition and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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No. 17-949

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Date: August 7, 2018

28262

QUESTION PRESENTED

Whether the Alaska National Interest Lands Conservation Act prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is John Sturgeon.

Respondents are Bert Frost, in his official capacity as Alaska Regional Director of the National Park Service; Greg Dudgeon; Andee Sears; Ryan Zinke, Secretary of the Interior; Michael Reynolds, in his official capacity as Acting Director of the National Park Service; The National Park Service; and The United States Department of the Interior.

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INTRODUCTION

In the decision below, the Ninth Circuit—for the second time—declared significant portions of Alaska to be subject to federal management and control based on a statute that was expressly designed to limit federal authority over State, Native Corporation, and private lands in Alaska. That result "sounds absurd, because it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013). The "simple truth" is that "Alaska is often the exception, not the rule." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1071 (2016). Congress expressly provided in the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA") that only *federal* lands would be subject to the oversight and management of the National Park Service ("NPS"). Yet the Ninth Circuit has now (again) allowed NPS to reach beyond federal land and regulate conduct that occurs solely on State, Native Corporation, or private land.

Like the last time this case was before the Court, the government seeks to defend the judgment below primarily based on alternative arguments rather than the Ninth Circuit's actual reasoning. Either way, however, the result should be the same. Under the unambiguous text of ANILCA, only land to which the federal government holds "title" may be deemed "public lands" subject to the regulatory jurisdiction of NPS. *See* 16 U.S.C. §§ 3102, 3103(c). It is undisputed that the federal government does not hold title to the waterways at issue here. The Ninth Circuit and NPS nonetheless seek to evade that dispositive fact by pointing to implicit reservations of water rights, statutory purposes, and constitutional powers that Congress has not exercised. But none of those arguments can justify writing the word "title" out of ANILCA—

especially given that this case is fraught with federalism implications that require a clear statement from Congress before displacing Alaska's sovereign authority over its lands and waters. This Court should apply ANILCA as written and reverse the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 872 F.3d 927 and is reproduced in the Appendix to the Petition ("Pet.App.") at 1a-23a. The Ninth Circuit's earlier opinion is reported at 768 F.3d 1066 and is reproduced at Pet.App.26a-57a. The Ninth Circuit's earlier order denying rehearing en banc is unreported and is reproduced at Pet.App. 24a-25a. This Court's opinion vacating the Ninth Circuit's earlier opinion is reported at 136 S. Ct. 1061. The opinion of the United States District Court for the District of Alaska is available at 2013 WL 5888230 and is reproduced at Pet.App.58a-81a.

JURISDICTION

The Ninth Circuit rendered its decision on October 2, 2017. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reproduced at Pet.App.82a-88a.

STATEMENT OF THE CASE

A. Land Allocation in Alaska

Alaska contains 586,000 square miles of land and 95,000 square miles of water. Before statehood, the United States owned 98 percent of Alaska's land and waters. *Sturgeon*, 136 S. Ct. at 1065. To ensure the new State's economic viability, Congress granted 103,350,000 acres of land to Alaska (or 28 percent of its overall area) and required that any further conveyance of this land must reserve mineral and other rights to the State. *Id.* This unprecedented grant was driven by "fear that the territory was economically immature" and that its small, dispersed population "would be unable to support a state government." *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). The land grant would act "as an endowment which would yield the income that Alaska needed to meet the costs of statehood" and thus "ensure the economic and social well-being of the new state." *Id.* at 335-36.

Congress also granted Alaska "'title to and ownership of the lands beneath navigable waters' within the State, in addition to 'the natural resources within such lands and waters,' including 'the right and power to manage, administer, lease, develop, and use the said lands and natural resources.'" *Sturgeon*, 136 S. Ct. at 1065 (quoting 43 U.S.C. § 1311(a)). Because of these grants, Alaska could "fulfill its state policy 'to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.'" *Id.* (quoting Alaska Const. Art. VIII, § 1).

Statehood, however, did not resolve the land claims of Alaska Natives. Congress resolved these issues in 1971 by passing the Alaska Native Claims Settlement Act ("ANCSA") to provide "a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). ANCSA extinguished Alaska Natives' aboriginal land claims in exchange for $960 million, allowing Alaska Native-owned corporations to select approximately 40 million acres of federal land in Alaska. *Sturgeon*, 136 S. Ct. at 1065. Congress intended for the Native Corporations to use these lands and assets for economic development that would benefit the Native peoples of Alaska. 43 U.S.C. § 1607.

ANCSA also addressed land allocation between the State of Alaska and the United States by directing the Secretary of the Interior to withdraw up to 80 million acres of federal land for potential inclusion as "units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems." 43 U.S.C. § 1616(d)(2). But this process was not completed because the withdrawals never received the required Congressional approval. *Sturgeon*, 136 S. Ct. at 1065. In response, the Carter administration withdrew over 100 million acres of land, designating over 56 million acres of it as national monuments. Proclamation No. 4611, 43 Fed. Reg. 57,009 (Dec. 5, 1978) (Admiralty Island National Monument); Public Land Order No. 5653, 43 Fed. Reg. 59,756 (Dec. 21, 1978); Public Land Orders 5696-5711, 45 Fed. Reg. 9562 (Feb. 12, 1980).

B. The Alaska National Interest Lands Conservation Act

Alaskans protested the Carter withdrawals because they subjected these lands to intrusive federal regulation. *Sturgeon*, 136 S. Ct. at 1065-66. Congress passed ANILCA in 1980 to address those concerns. 94 Stat. 2371, 16 U.S.C. § 3101 *et seq.* ANILCA had two goals: "First, to provide 'sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska.' And second, to provide 'adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Sturgeon*, 136 S. Ct. at 1066 (quoting 16 U.S.C. § 3101(d) (citation omitted)); *see City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984) ("Congress became aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use.").

ANILCA affected 104 million acres of Alaskan land. It rescinded the much-criticized Carter designations. *See* 16 U.S.C. § 3209(a). At the same time, however, ANILCA expanded the National Park System by over 43 million acres, creating ten new national parks, preserves, and monuments and tripling the nation's federal wilderness preservation acreage. *See Sturgeon*, 136 S. Ct. at 1066; 16 U.S.C. § 410hh. ANILCA divided federal preservation lands in Alaska into conservation system units ("CSUs"), which are defined to include "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a

National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter." 16 U.S.C. § 3102(4); *Sturgeon*, 136 S. Ct. at 1066.

Critically, however, the boundaries of CSUs did *not* precisely track the boundaries of federal preservation lands. Instead, Congress directed that "[w]henever possible, boundaries shall follow hydrographic divides or embrace other topographic or natural features." 16 U.S.C. § 3103(b). As a result, the new CSUs encompassed within their boundaries over 18 million acres of State, Native Corporation, and private land. *Sturgeon*, 136 S. Ct. at 1066.

Essential to the compromise ANILCA embodied was Congress's assurance that the millions of acres of land previously set aside for the economic and social needs of the Alaskan people would not be subject to federal control and management. This was an especially acute concern because, as noted, the CSUs were drawn to follow natural features of the landscape rather than the boundaries of federal lands. To ensure that state-owned lands would remain available for the economic and social needs of Alaskans even if they were encompassed within the boundaries of a CSU, ANILCA included an express assurance that these lands would remain free from federal control:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after

> December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

Congress defined each of the key terms in this provision, including "land," "federal land," and "public lands." "Land" means "lands, waters, and interests therein." 16 U.S.C. § 3102(1). "Federal land" means "lands the title to which is in the United States after December 2, 1980." *Id.* § 3102(2). And "public lands" means "land situated in Alaska which, after December 2, 1980, are Federal lands" except for land selected by the State of Alaska or a Native Corporation the title to which has not yet been conveyed. *Id.* § 3102(3). In addition, the statute defines "conservation system unit" to include the NPS units addressed by ANILCA. *Id.* § 3102(4). Read together with these definitions, Section 103(c) makes clear that "only 'lands, waters, and interests therein' to which the United States has 'title' are considered 'public' land 'included as a portion' of the conservation system units in Alaska." *Sturgeon*, 136 S. Ct. at 1067.

Section 103(c)'s purpose was apparent from the start of the legislative process. It began as an amendment to "make clear beyond any doubt that any State, Native, or

private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling). "Those private lands, and those public lands owned by the State of Alaska" are thus "not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413, at 303 (Nov. 14, 1979).

Arizona Congressman Morris Udall, ANILCA's primary sponsor in the House of Representatives, further explained that:

> We recognize that there are certain lands which have been selected by Native Corporations and which are within the exterior boundaries of some of the conservation system units .... I want to make clear that inclusion of these Native lands within the boundaries of conservation system units is not intended to affect any rights which the Corporations may have under this act, the Alaska Native Claims Settlement Act, or any other law, or to restrict use of such lands by the owning Corporations nor to subject the Native lands to regulations applicable to the public lands within the specific conservation system unit.

125 Cong. Rec. 9905 (1979).

Senator Ted Stevens of Alaska agreed:

> The fact that Native lands lie within the boundaries of conservation system units is not intended to affect any rights which the corporations have under this act, the Alaska Native Claims Settlement Act, or any other law.... The Native organizations have been given repeated assurances that including their lands within conservation units will not affect the implementation of the Native Claims Settlement Act.

126 Cong. Rec. 21,882 (1980).

On that understanding, Section 103(c) was added to the final version of ANILCA via concurrent resolution. *See* H. Con. Res. 452, 96th Cong. (1980). Only an express statutory prohibition would guarantee that some "sharp lawyer" would not use "catch words" to circumvent Congress's intention that "the fact that [land] is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, native or private land or make it subject to any of the laws or regulations that pertain to U.S. public lands." 125 Cong. Rec. 11,158 (1979). In sum, Congress enacted Section 103(c) to establish unequivocally that "only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands." 126 Cong. Rec. 30,498 (1980) (statement of Rep. Udall).

C. ANILCA's Regulatory History

For sixteen years following the statute's enactment, NPS interpreted ANILCA to deny it authority to regulate

State, Native Corporation, and private lands physically located within the boundaries of CSUs. In 1981, NPS issued regulations to "provide interim guidance on public uses of National Park System units in Alaska, including units established by the Alaska National Interest Lands Conservation Act." 46 Fed. Reg. 31836 (June 17, 1981). The preamble explained that:

> Sections 103(c) and 906(o) of ANILCA generally restrict the applicability of National Park Service regulations to federally owned lands within park area boundaries. Consistent with the statute and the explanatory legislative history ... § 13.2(e) restricts the applicability of these regulations to 'federally owned' lands (defined to mean all land interests held by the Federal government including unconveyed Native selections) within park area boundaries .... These regulations would not apply to activities occurring on State lands. Similarly, these regulations would not apply to activities occurring on Native or any other non-federally owned land interests located inside park area boundaries.

Id. at 31843.

As promulgated in 1983, 36 C.F.R. § 1.2(b) provided that:

> The regulations contained in Parts 1 through 7 of this chapter are not applicable on privately owned lands and waters (including Indian lands and waters owned individually or tribally)

> within the boundaries of a park area, except as may be provided by regulations relating specifically to privately owned lands and waters under the legislative jurisdiction of the United States.

48 Fed. Reg. 30275 (June 30, 1983). 36 C.F.R. § 1.4, in turn, defined "legislative jurisdiction" to mean "lands and waters under the exclusive or concurrent jurisdiction of the United States." 48 Fed. Reg. at 30261. NPS added that the regulation was "intended to also include State inholdings that are under the legislative jurisdiction of the United States." *Id.*

Confusion nonetheless persisted as to the regulatory status of State-owned lands and the meaning of the phrase "legislative jurisdiction of the United States." In 1987, NPS resolved this confusion by revising Section 1.2(b) to provide:

> Except for regulations containing provisions that are specifically applicable, regardless of land ownership, on lands and waters within a park area that are under the legislative jurisdiction of the United States, the regulations contained in Parts 1 through 5 and Part 7 of this chapter do not apply on non-federally owned lands and waters or on Indian lands and waters owned individually or tribally within the boundaries of a park area.

52 Fed. Reg. 35239 (Sept. 18, 1987).

NPS addressed the question of State-owned lands by broadening the exemption from NPS regulations to include all "non-federally owned lands and waters or [] Indian lands and waters." *Id.* As to the meaning of the "legislative jurisdiction of the United States," NPS explained that "when applied to non-federal lands, [it] means lands and waters over which the State has ceded some or all of its legislative authority to the United States." *Id.* at 35238.

NPS reversed course in 1996, extending all of its regulations to non-federal lands within CSUs in Alaska. To accomplish this, NPS promulgated 36 C.F.R. § 1.2(a)(3), which provides that NPS regulations apply to "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters ... *without regard to the ownership of submerged lands, tidelands, or lowlands.*" 61 Fed. Reg. 35136 (July 5, 1996) (emphasis added). NPS also revised 36 C.F.R. § 1.2(b) to provide that the "regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, *except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.*" *Id.* (emphasis added). Among the NPS regulations made applicable to State-owned lands is 36 C.F.R. § 2.17(e), which bans the use of hovercraft within NPS boundaries.

NPS therefore claimed power to enforce both its general regulations—including the hovercraft ban in 36 C.F.R. § 2.17(e)—and its Alaska-specific NPS regulations in 36 C.F.R. Part 13 over all State-owned navigable waters

within the boundaries of the CSUs that ANILCA created or expanded. NPS brushed aside comments arguing that Section 103(c) of ANILCA "should be interpreted as superseding NPS authority to regulate [non-federal] waters within park boundaries." 61 Fed. Reg. at 35,135. According to NPS, Section 103(c) "was characterized by Congress as a minor technical provision" and interpreting it to allow NPS regulation of nonfederal navigable waters within CSUs would be "consistent with [ANILCA's] underlying protective purposes." *Id.*

D. Factual Background

Petitioner John Sturgeon is a lifelong Alaskan. He has hunted moose along the Nation River in Alaska for nearly 40 years. *Sturgeon*, 136 S. Ct. at 1064. From 1990 until the events giving rise to this suit, he traveled by means of a small personal hovercraft, which allowed him to float over the river's shallow, difficult portions to his preferred hunting grounds. *Id.*; Pet.App.31a. Part of Mr. Sturgeon's route along the Nation River lies within the the Yukon-Charley Rivers National Preserve ("Yukon-Charley"), which is located in east-central Alaska, west of the village of Eagle. ANILCA created Yukon-Charley as a CSU in connection with its expansion of the Park System in 1980. *See* 16 U.S.C. § 410hh(10). Mr. Sturgeon must transit through Yukon-Charley along the Nation River to reach his preferred hunting grounds, although the grounds themselves are not within the CSU. *Sturgeon*, 136 S. Ct. at 1064.

Because the Nation River is navigable, *see Alaska v. United States*, 201 F.3d 1154, 1158 (9th Cir. 2000), the State of Alaska holds title to the riverbed and "'the natural

resources within such lands and waters,' including 'the right and power to manage, administer, lease, develop, and use the said lands and natural resources.'" *Sturgeon*, 136 S. Ct. at 1065 (quoting 43 U.S.C. §1311(a)). Under Alaska law, Mr. Sturgeon may use his hovercraft on the Nation River. *Id.* at 1064; *see also* Alaska Const. Art. VIII, § 3 ("Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."); Alaska Admin. Code tit. 11, § 96.020.

In the fall of 2007, Mr. Sturgeon entered the Nation River from the Yukon River by hovercraft while traveling to his usual hunting grounds. *Sturgeon*, 136 S. Ct. at 1066. Approximately two miles upriver, while stopped on a gravel bar to repair the hovercraft's steering cable, he was approached by Park Service rangers. *Id.* at 1066-67. They informed him that it was a crime to operate the hovercraft in the Yukon-Charley. *Id.* Mr. Sturgeon explained that the prohibition did not apply because the hovercraft was on a State-owned waterway. *Id.* at 1067. The rangers nevertheless ordered him to remove his hovercraft from within the boundaries of the Yukon-Charley. *Id.*

After returning from his thwarted hunting trip, Mr. Sturgeon communicated with NPS Special Agent Andee Sears in Anchorage, Alaska. Pet.App.72a. She acknowledged that the State owned the Nation River's submerged lands, but insisted that hovercraft use within the Yukon-Charley was a federal crime, even on navigable waters and State-owned submerged lands, and would subject Mr. Sturgeon to criminal citation. Pet.App.31a. Fearing federal prosecution, Mr. Sturgeon stopped using his hovercraft in the Yukon-Charley. *Sturgeon*, 136 S. Ct. at 1067.

E. Procedural History and this Court's Ruling

On September 14, 2011, Mr. Sturgeon filed suit in the U.S. District Court for the District of Alaska to, *inter alia*, enjoin NPS from applying its hovercraft regulation to the Nation River. Pet.App.59a; 36 C.F.R. §§ 1.2(a)(3), 2.17(e). He argued that Section 103(c) of ANILCA prohibited NPS from enforcing its hovercraft ban on the Nation River because: (1) the Nation River was a "land[] ... conveyed to the State," because the Alaska Statehood Act and the Submerged Lands Act gave Alaska ownership of the submerged lands beneath (and the resources within) the navigable waters in Alaska; and (2) the hovercraft ban was a "regulation[] applicable solely to public lands within such units" as it applied "solely" by virtue of NPS's authority to manage national parks. Pet.App.59a-60a.

The district court granted summary judgment to NPS. Pet.App.75a-81a. The court held that 54 U.S.C. § 100751 and its corresponding regulation, 36 C.F.R. § 1.2, gave NPS authority to ban the use of hovercraft on the Nation River because the river's bed and waters were lands "within the boundaries" of an ANILCA conversation system unit (the Yukon-Charley). Pet.App.76a. Section 103(c), the court concluded, did not limit that authority. Even assuming the Nation River had been "conveyed" to the State and was not a "public land," 16 U.S.C. § 3103(c), the court reasoned that the hovercraft regulation was not applicable "solely" to public lands within CSUs; it was of "general application across the entirety of the NPS." Pet.App.75a-81a. ANILCA thus did not prohibit application of the NPS hovercraft regulation to activities on the Nation River.

The Ninth Circuit affirmed. It held that because the hovercraft ban "applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks," the court explained, it is not a "'regulation[] applicable *solely* to public lands within [CSUs].'" Pet.App.49a (quoting 16 U.S.C. § 3103(c) (emphasis added)). Accordingly, "even assuming (without deciding) that the waters of and lands beneath the Nation River have been 'conveyed to the State' for purposes of § 103(c), that subsection does not preclude the application and enforcement of the NPS regulation at issue." *Id.* ANILCA did not override NPS authority to regulate "'boating and other activities on or relating to water located within [CSUs].'" *Id.* at 48a-49a (quoting 54 U.S.C. § 100751).

This Court granted certiorari and vacated the Ninth Circuit's judgment. The Court found the Ninth Circuit's reading of Section 103(c) to be "inconsistent with both the text and context of the statute as a whole." *Sturgeon*, 136 S. Ct. at 1070. Under such an interpretation, NPS "may apply nationally applicable regulations to 'non-public' lands within the boundaries of conservation system units in Alaska, but it may not apply Alaska-specific regulations to those lands." *Id.* That was a "surprising conclusion" because "ANILCA repeatedly recognizes that Alaska is different—from its 'unrivaled scenic and geological values,' to the 'unique' situation of its 'rural residents dependent on subsistence uses,' to 'the need for development and use of Arctic resources with appropriate recognition and consideration given to the unique nature of the Arctic environment.'" *Id.* (quoting 16 U.S.C. §§ 3101(b), 3111(2), 3147(b)(5)). The Ninth Circuit's interpretation, in sum, could not be reconciled with the fact that "Alaska is often the exception, not the rule." *Id.* at 1071.

The Court acknowledged that NPS had made other arguments in defense of its regulation, which the parties had briefed and argued. *See id.* at 1072. First, the parties disputed "whether the Nation River qualifies as 'public land' for purposes of ANILCA." *Id.* Second, the parties disputed "whether the Park Service has authority under Section 100751(b) to regulate Sturgeon's activities on the Nation River, even if the river is not 'public' land, or whether—as Sturgeon argues—any such authority is limited by ANILCA." *Id.* And, third, the parties disputed whether NPS "has authority under ANILCA over both 'public' and 'non-public' lands within the boundaries of [CSUs] in Alaska, to the extent a regulation is written to apply specifically to both types of land." *Id.*

Because the Ninth Circuit's erroneous interpretation of Section 103(c) was "the sole basis for the disposition of this case," this Court remanded the case to consider NPS's alternative arguments. *Id.* at 1071. Those arguments "touch[ed] on vital issues of state sovereignty, on the one hand, and federal authority, on the other," so this Court concluded that they "should be addressed by the lower courts in the first instance." *Id.* at 1072.

F. Proceedings on Remand

On remand from this Court, the Ninth Circuit reaffirmed its original position. This time, the court held that the Nation River is "public land" under ANILCA because "the United States has an *implied* reservation of water rights" in it. Pet.App.19a (emphasis added). Therefore, Section 103(c)'s ban on extending regulations "applicable solely to public lands" to non-federal Alaska lands was not an obstacle to prohibiting hovercraft.

The Ninth Circuit noted that "[u]nder the Submerged Lands Act, '[t]he United States retains all its navigational servitude and rights in and powers of regulation and control of [submerged] lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs.'" Pet.App.11a (quoting 43 U.S.C. § 1314(a)). But the court also recognized that a "navigational servitude is not 'public land' within the meaning of ANILCA' because 'the United States does not hold title to the ... servitude.'" *Id.* (quoting *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986)). That was because, among other reasons, "Congress did not intend 'to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters' when it enacted ANILCA." *Id.* (quoting *Alaska v. Babbitt (Katie John I)*, 72 F.3d 698, 703 (9th Cir. 1995)).

The Ninth Circuit nevertheless concluded that the Nation River is "public land" under ANILCA pursuant to the "reserved water rights doctrine." Pet.App.17a. To reach that conclusion, the court relied on circuit precedent known as the *Katie John* decisions. Pet.App.11a-13a; (discussing *Katie John I*, 72 F.3d 698; *John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001); *John v. United States (Katie John III)*, 720 F.3d 1214 (9th Cir. 2013)). In those decisions, the Ninth Circuit held that "public lands," in the context of ANILCA's Title VIII subsistence provisions, included navigable waters where the federal government has reserved water rights. *Katie John I*, 72 F.3d at 703-04. This conclusion was mainly driven by the Ninth Circuit's desire to give effect to ANILCA's subsistence provisions and to act in accordance with what it saw as clear congressional intent to protect subsistence fishing by rural residents. *See id.* at 702 n.9;

Katie John II, 247 F.3d at 1037 (Tallman, J., concurring in the judgment).

Applying the reserved water rights doctrine, the Ninth Circuit held that "'[t]he United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes,' including ANILCA, and thereby has 'implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations.'" Pet.App.12a (quoting *Katie John I*, 72 F.3d at 703 & n.10). "This reservation of water rights gave the United States 'interests in some navigable waters'" and thus "ANILCA's 'definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine.'" *Id.* (quoting *Katie John I*, 72 F.3d at 703).

The Ninth Circuit concluded that the *Katie John* cases foreclosed Mr. Sturgeon's challenge to NPS's hovercraft ban. Pet.App.13a-18a. While that line of precedent arose in the markedly different context of subsistence management, the Ninth Circuit found no basis to distinguish it from this case. For example, pointing to "ANILCA's purpose of 'provid[ing] sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska,'" Pet.App.14a (quoting 16 U.S.C. § 3101(d)), and to the pre-ANILCA steps the Carter Administration took to reserve the Yukon-Charley for environmental purposes, the court held that the hovercraft ban was needed to accomplish the purpose of the reservation, Pet.App.14a-16a. While conceding that "'[r]eserved water rights are not a "title" interest,'" the Ninth Circuit found that true only "in a

narrow, technical sense" because the "word 'title' has many meanings." Pet.App.16a-17a. "Thus, 'title' to an 'interest' in water almost certainly means a vested interest in the water, such as a reserved water right." Pet.App.17a.

Finally, the court rejected Mr. Sturgeon's argument that the ban exceeds what reserved rights the United States holds, even though the use of hovercraft does not jeopardize the Nation River's water level or navigability, or otherwise compromise any interest the United States might hold in it. Pet.App.17a-18a. In the Ninth Circuit's view, NPS may seize control of "'all the bodies of water on which the United States' reserved rights *could at some point* be enforced—*i.e.*, those waters that are or *may become necessary* to fulfill the primary purposes of the federal reservation at issue.'" Pet.App.18a (quoting *Katie John III*, 720 F.3d at 1231) (emphasis in original). "Here, one of the reservation's primary purposes is to protect fish. The diminution of water in any of the navigable waters within Yukon-Charley's boundaries would necessarily impact this purpose, giving rise to a reserved water right." *Id.*

Besides writing the majority opinion, Judge Nguyen issued a concurrence that Judge Nelson joined. Pet.App.20a-23a. She agreed the panel was "bound by [its] *Katie John* decisions to analyze this case under the reserved water doctrine." Pet.App.20a. However, that was "unfortunate" because "[a] reserved water right is the right to a sufficient *volume* of water for use in an appropriate federal purpose" and this case has "nothing to do with that." *Id.* Judge Nguyen instead would have upheld the NPS hovercraft ban under the federal government's power to "regulate navigation on navigable waters" under

the Commerce Clause, *id.*, even though Congress had declined to exercise that power in enacting ANILCA, Pet.App.11a.

SUMMARY OF ARGUMENT

I. The navigable river upon which Mr. Sturgeon sought to travel by hovercraft is not part of the National Park System, and NPS may not regulate it as though it were. Section 103(c) of ANILCA provides that only "public lands (as such term is defined in this Act)" will be considered part of a CSU, and that NPS may not regulate non-public lands and waters that happen to fall within the boundaries of a CSU. 16 U.S.C. § 3103(c). "Public lands" are defined in relevant part as "federal lands," which are in turn defined as "lands the title to which is in the United States." *Id.* § 3102(2)-(3).

It is undisputed that the United States does not have "title" to either the Nation River or the submerged lands beneath the river; the government has conceded as much in its briefs before this Court. Indeed, the State of Alaska is the only government entity that can claim "title" to the river. *See, e.g.*, *PPL Montana v. Montana*, 565 U.S. 576, 604 (2012) (States "take[] title to the navigable waters and their beds in trust for the public" upon being admitted to the Union). The Court need not definitively resolve the issue of who owns the river, however, given that the United States' undisputed *lack* of title to the Nation River is sufficient to remove those waters from ANILCA's definition of "public lands." Because the Nation River is not "public land," it is not part of a CSU and thus not subject to NPS regulations—such as the hovercraft ban—regarding the management of CSUs.

Subjecting Alaska's navigable waterways to NPS's regulatory jurisdiction would also be contrary to the purpose, structure, and history of ANILCA, and would disregard the "simple truth that Alaska is often the exception, not the rule." *Sturgeon*, 136 S. Ct. at 1071. The CSUs within Alaska were not drawn merely to encircle federal lands, but were instead drawn by reference to natural features such as rivers and mountains. As a result, the boundaries of the CSUs sweep in millions of acres of State, Native Corporation, and private lands. The express purpose of Section 103(c) was to ensure that those lands would *not* fall within NPS jurisdiction based on the mere happenstance that they were encircled by a boundary drawn based on geographical landmarks. Notably, another provision of Section 103(c) provides an explicit mechanism through which State, Native Corporation, and private lands may become subject to NPS jurisdiction, which only underscores that NPS's existing jurisdiction is limited to the "public" (*i.e.*, federally owned) lands within the CSUs.

Even if the text, structure, history, and purpose of Section 103(c) were unclear—and they are not—principles of federalism would compel a ruling in favor of Mr. Sturgeon. This case has profound implications for the federal-state balance: the decision below would dramatically expand NPS's regulatory jurisdiction in Alaska and thereby displace any state policies to the contrary (such as Alaska's decision to permit hovercraft use on navigable waters). Yet nothing in ANILCA comes close to providing the clear statement of congressional intent to displace state authority that this Court's precedents require.

II. The Ninth Circuit acknowledged that the federal government does not hold title to either the Nation River itself or the submerged lands beneath that waterway. The court nonetheless concluded that the "reserved water rights" doctrine provides a sufficient federal "interest" to render the carve-out in Section 103(c) inapplicable. That reasoning fails at every level.

The most obvious flaw in the Ninth Circuit's reasoning is its disregard of the statutory text. ANILCA's definition of "public lands" is not triggered based on a mere federal "interest" or "right"; it instead requires the United States to hold *title* to the lands at issue for them to be deemed a unit of the NPS system. The reserved water rights doctrine confers, at most, the right to *use* (or prevent others from using) a certain amount of water when necessary to achieve specific federal objectives. Any such rights are far more akin to a navigational servitude than to an alienable property right that would be tantamount to holding "title" to the property.

In all events, even where the reserved water rights doctrine applies, it merely ensures that sufficient water will be available to meet the *specific uses* for which the federal government has reserved land. This Court has never construed that doctrine as providing plenary federal regulatory authority over any body of water in which there is a reserved right. To the contrary, the Court has repeatedly emphasized that water use by non-federal parties may be curtailed under the reserved water rights doctrine *"only to the extent necessary"* to achieve the federal objective and "no more." *Cappaert v. United States*, 426 U.S. 128, 141 (1976) (emphasis added). Thus, even if—as the Ninth Circuit asserted—one of the

purposes of the Yukon-Charley reservation was to protect fish, that federal interest cannot justify a hovercraft ban that has no impact whatsoever on the volume of water available to the fish in the Nation River.

III. Two of the three judges on the Ninth Circuit panel agreed that the reserved water rights doctrine has "nothing to do with" this case, but they deemed themselves bound by "unfortunate" circuit precedent holding otherwise. Pet.App.20a-23. The concurring judges nonetheless would have upheld the hovercraft ban based on alternative rationales that NPS is likely to advance again before this Court. Those arguments fare no better than the dubious reserved rights theory.

First, NPS has argued that its general rulemaking authority over "units" of the National Park System supersedes any Alaska-specific limitations in ANILCA. But that argument runs headfirst into the principle that the specific controls the general in matters of statutory interpretation—a rule that applies with special force here because ANILCA addresses the "specific problem" of Alaskan lands with the "specific solution" of Section 103. *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted). Given that ANILCA carves out an express exclusion from the lands that are deemed part of an NPS "unit," the government cannot circumvent that limitation by pointing to its general rulemaking authority over lands that are classified as part of an NPS unit.

Finally, the concurring judges argued that the hovercraft ban can be upheld directly under the Commerce Clause. But no court has ever held that a regulation

exceeding an agency's statutory authority can be justified by pointing to a constitutional power Congress has not invoked. Agencies are creatures of statute and, unlike Congress, do not have roving authority to legislate to the full extent of the federal government's constitutional powers. Congress unquestionably possesses broad power to regulate navigable waters and interstate commerce, but it simply has not exercised that power here; to the contrary, Congress enacted ANILCA to expressly limit NPS authority over non-federal lands and waters in Alaska. The concurrence's reasoning fares no better than the majority's and provides no basis for affirming the judgment below.

ARGUMENT

I. ANILCA Excludes Alaska's Navigable Waterways from the National Park Service's Regulatory Authority.

A. ANILCA's Plain Text Prohibits NPS from Regulating Navigable Waters Within Alaska's CSUs.

The National Park Service has authority to promulgate regulations "necessary or proper for the use and management of System units," 54 U.S.C. § 100751(a), and "may prescribe regulations under subsection (a) concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States," *id.* § 100751(b). That general authority, however, is often restricted in the enabling legislation for specific parks. Here, ANILCA expressly prohibits NPS from exercising jurisdiction over

State, Native Corporation, and private lands and waters that happen to fall within the boundaries of a CSU in Alaska.

Section 103(c) of ANILCA provides that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). It further instructs that "[n]o lands which, before, on, or after [the date of enactment of this Act], are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." *Id.* This provision "draws a distinction between 'public' and 'non-public lands' within the boundaries of [CSUs]," *Sturgeon*, 136 S. Ct. at 1071, and makes clear that non-public lands remain outside the reach of federal park management authority even if they happen to fall within a CSU.

ANILCA defines "public lands" as "land situated in Alaska which, after December 2, 1980, are Federal lands" except for land selected by the State of Alaska or a Native Corporation the title to which has not yet been conveyed. 16 U.S.C. § 3102(3).[1] And "federal land," in turn, means "lands *the title to which is in the United States* after December 2, 1980." *Id.* § 3102(2) (emphasis added). Putting these definitions together, "only 'lands, waters, and interests therein' to which the United States has 'title' are considered 'public' land 'included as a portion' of the conservation system units in Alaska." *Sturgeon*, 136 S. Ct. at 1067.

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1. "Land" means "lands, waters, and interests therein." 16 U.S.C. § 3102(1).

The ordinary meaning of "title" is "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property." Black's Law Dictionary (10th ed. 2014). It is undisputed that the United States does not hold title to the navigable waters that flow over non-federal land within the boundaries of the CSUs in Alaska. Indeed, the United States has conceded as much. *See* Br. in Opp. 14 (arguing that "'[n]either sovereign nor subject can acquire anything more than a mere usufructuary right'" in navigable waters) (citation omitted). That should be the end of the matter under the plain text of ANILCA, as the relevant portion of the Nation River on which Mr. Sturgeon sought to use his hovercraft is not "land[] the title to which is in the United States after December 2, 1980." 16 U.S.C. § 3102(2).

If title to the Nation River belongs to any government entity, it is the State of Alaska. As this Court has repeatedly emphasized, "ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water is an essential attribute of [state] sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) (citation omitted); *see also United States v. Alaska*, 521 U.S. 1, 4 (1997) (same). The Alaska Statehood Act, 72 Stat. 339, 343 § 6(m) (1958), expressly provides that Alaska "shall have the same rights as do existing States" with respect to submerged lands.[2]

2. *See also* 43 U.S.C. § 1311(a) (Submerged Lands Act providing: "It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and

By virtue of the Equal Footing doctrine, moreover, all States (including Alaska) have an "absolute right" to their waters, *PPL Montana*, 565 U.S. at 590, under which they hold "title to the navigable waters and their beds in trust for the public," *id.* at 604. "For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842); *see also United States v. California*, 436 U.S. 32, 40 (1978) ("[T]he Submerged Lands Act transferred 'title to and ownership of' the submerged lands and waters to [the States], along with 'the right and power to manage, administer, lease, develop, and use' them.") (quoting 43 U.S.C. § 1311(a)).

Because the United States' undisputed *lack* of title to the Nation River is sufficient to resolve this dispute, the Court need not definitively resolve who ultimately holds title to the waters at issue. But given its indisputable ownership of the land submerged beneath the Nation River, the State of Alaska at a minimum has a title claim that is superior to the federal government's claim with respect to those waters.

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use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States....").

B. Subjecting Alaska's Navigable Waters to NPS Regulatory Authority Would Be Contrary to the Purpose, Structure, and History of ANILCA.

In enacting ANILCA, Congress did not intend to pursue conservation at all costs. To the contrary, Congress designed the statute to strike a "proper balance" between "the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska" and "provid[ing] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d); *see also Sturgeon*, 136 S. Ct. at 1066 (discussing ANILCA's "two stated goals"). ANILCA is thus replete with Alaska-specific provisions that "reflect the simple truth that Alaska is often the exception, not the rule." *Sturgeon*, 136 S. Ct. at 1071.

Section 103(c) is critical to the balance Congress struck in enacting ANILCA. The statute set aside 104 million acres of land for preservation purposes and created ten new national parks, preserves, and monuments. *See id.* at 1066. At the same time, however, Congress added Section 103(c) to ANILCA to "make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and *are not subject to regulations which are applied to public lands*, which, in fact, are part of the unit." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling) (emphasis added).

That policy makes eminent sense in light of the manner in which Congress directed the CSUs in Alaska to be drawn. As noted above, the boundaries of CSUs

were *not* drawn merely to encircle federal lands, but were instead drawn with reference to "hydrographic divides or ... other topographic or natural features." 16 U.S.C. § 3103(b). Section 103(c) ensured that State, Native Corporation, and private lands did not become swept up in a web of federal regulations merely because they happened to be located within the boundary of a CSU that was drawn in reference to "natural features" such as rivers or mountains. "[T]he fact that [land] is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, native or private land or make it subject to any of the laws or regulations that pertain to U.S. public lands." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling).

The broader structure of Section 103(c) also underscores that NPS may not exercise jurisdiction over any areas other than "public lands" within CSUs. The third sentence of Section 103(c) sets forth the only way that non-public land may become subject to NPS management, providing that if "the State, a Native Corporation, or other owner" wishes to "convey" land, "the Secretary may acquire such lands in accordance with applicable law." 16 U.S.C. § 3103(c). Only after the non-public land is conveyed to the United States "shall [it] become part of the unit, and be administered accordingly." *Id.* That sentence would be superfluous if NPS could exercise jurisdiction over any land within the boundaries of a CSU regardless of whether it met the definition of "public lands."

In sum, Congress enacted Section 103(c) to establish unequivocally that "only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands." 126 Cong. Rec.

30,498 (1980) (statement of Rep. Udall). "[P]rivate lands, and those public lands owned by the State of Alaska," are thus "not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413, at 303 (Nov. 14, 1979).[3]

C. At a Minimum, Nothing in ANILCA Reflects a Clear Congressional Intent to Subordinate State Regulation to NPS Regulation with Respect to Navigable Waters in Alaska CSUs.

Any holding that navigable waters within CSUs must be treated as "public lands" under ANILCA would also have profound federalism implications because it would subject large swaths of Alaska to intrusive NPS regulations and would displace state law to the extent it conflicted with those regulations. Yet ANILCA does not contain anything resembling the "clear statement" needed to displace Alaska's sovereignty in this manner.

The United States may not invade a State's traditional authority over waters absent a clear statement of intent

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3. Elsewhere in ANILCA, Congress expressly restricted NPS's authority over even *public lands* in Alaska CSUs. For example, NPS must allow specialized uses of public lands in Alaska, including hunting, subsistence uses, commercial fishing, and motorized transportation. *See, e.g.*, 16 U.S.C. §§ 410hh-2, 410hh-4. ANILCA similarly provides that, even on public lands, Alaska retains its preeminent authority to manage fish and wildlife. *See id.* § 3202(a) (nothing in statute intended to "enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands").

by Congress. After all, "Congress does not exercise lightly" the "extraordinary power" to "legislate in areas traditionally regulated by the States," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), and thus "does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001). For that reason, this Court does not interpret a statute to "alter the 'usual constitutional balance between the States and the Federal Government'" unless Congress made "its intention to do so unmistakably clear in the language of the statute," *Gregory*, 501 U.S. at 460 (citation omitted), that is "plain to anyone reading", *id.* at 467, through a "clear and manifest statement," *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (citation omitted).

ANILCA does not come close to indicating a congressional intent to displace state law and subject Alaska's federal waterways to the full web of NPS regulations. The statute makes no mention of navigable waters or reserved water rights, let alone explicitly authorize NPS to assert jurisdiction over State waters. And its definition of "public lands" as "lands, waters, and interests therein" the "title to which is in the United States" does not clearly include navigable waters because Alaska owns the submerged lands below its navigable waters, and the United States does not hold title to the waters themselves. *Sturgeon*, 136 S. Ct. at 1067-69. Congress knows how to include a clear statement like this when it wishes to bring waters or submerged lands within the scope of NPS jurisdiction. *Compare, e.g.*, 16 U.S.C. § 251n(a)(1) (Olympic National Park includes "all submerged lands and waters of Lake Ozette, Washington, and the Ozette River, Washington.").

Indeed, several other provisions of ANILCA further undermine NPS's assertion of regulatory authority over Alaska's navigable waters. Congress excluded navigable waters from the definition of "public lands" by specifically exempting all "lands ... granted to the Territory of Alaska or the State under any other provision of Federal law." 16 U.S.C. § 3102(3)(A). This includes title to and ownership of the land underlying its navigable waters, which passed to Alaska under the Submerged Lands Act. *Totemoff v. State*, 905 P.2d 954, 964 (Alaska 1995) (citing 43 U.S.C. § 1311(a)). Non-public lands were then excluded from CSUs, as this Court held, and rendered off-limits to park regulation through Section 103(c). *Sturgeon*, 136 S. Ct. at 1070-71. Section 1319, furthermore, provides that ANILCA shall not be construed "as expanding or diminishing Federal or State jurisdiction, responsibilities, interests, or rights in water resources, development, or control." 16 U.S.C. § 3207(2). If this language includes a clear statement, it is one that *negates* any claim of title to Alaska's waterways.

Title VIII of ANILCA eliminates any doubt. Unique among ANILCA's titles, Title VIII has its own preamble, which states that its purpose is to continue the goals of the Alaska Native Claims Settlement Act. 16 U.S.C. § 3111(4). It is likewise the only section where Congress invokes its Commerce Clause authority "to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents." *Id.* If Congress had intended the statute to grant NPS ownership or regulatory rights beyond the narrow subsistence setting, ANILCA would not have provided that "[n]othing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands *except as may be provided in [Title VIII of*

this Act], or to amend the Alaska constitution" and that "[e]xcept as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands." 16 U.S.C. § 3202(a)-(b) (emphasis added).[4] The Ninth Circuit's ruling deprives these provisions of any meaningful force and effect and would have profound implications for Alaska's sovereignty despite the total lack of clear language indicating that Congress intended that outcome.

II. The Reserved Water Rights Doctrine Provides No Basis for Upholding the Hovercraft Ban.

As explained above, ANILCA defines public land in terms of what the federal government owns. Unless "title" to the land is held by the United States, it is simply not "public land" for purposes of ANILCA. 16 U.S.C. § 3102(3). The Ninth Circuit conceded that Alaska holds title to the submerged lands under navigable waters such as the Nation River. *See* Pet.App.9a-10a. The court also acknowledged that the United States does not hold title to the waters themselves; in fact, it asserted that "[w]ater cannot be owned" at all. Pet.App.17a

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4. For these reasons, the Ninth Circuit's application of its *Katie John* subsistence decisions, *see Katie John I*, 72 F.3d 698; *Katie John II*, 247 F.3d 1032; *Katie John III*, 720 F.3d 1214, had at least some foothold in the statute. The Court need not overturn or otherwise address the issue of subsistence management regulation in Alaska in order to rule in favor of Mr. Sturgeon. Title VIII supports an array of subsistence management regulations that are beyond the scope of Mr. Sturgeon's challenge. The focus of Mr. Sturgeon's challenge is instead the Ninth Circuit's decision to *expand* the reasoning of the *Katie John* cases beyond subsistence and, in so doing, grant NPS plenary control over State waterways.

The Ninth Circuit nonetheless concluded that the "reserved water rights" doctrine gave rise to an *implied* federal interest in navigable waters within CSUs that was sufficient to uphold NPS's regulatory authority over those waters. *See* Pet.App.12a (considering whether "a federally reserved water right is implicit in a federal reservation of public land"); Pet.App.19a ("[T]he United States has an implied reservation of water rights, rendering the river public lands.").

Under the reserved water rights doctrine, "when the Federal government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert*, 426 U.S. at 138. An intent to reserve such water "is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Id.* at 139. Even if that doctrine applied to the Nation River in certain circumstances, it cannot transform the River into "public land" for purposes of Section 103(c), nor can it be used to justify NPS's hovercraft ban, for several independent reasons.

A. Reserved Water Rights Do Not Constitute a "Title" Interest Under Section 103(c).

At the outset, the Ninth Circuit's reliance on the reserved water rights doctrine has no basis in the text of ANILCA. Section 103(c) and the related definitions provide that "public land" means in relevant part "Federal lands," which are defined as "lands the title to which is in the United States after December 2, 1980." 16 U.S.C. § 3102(2)-(3). Far from conferring "title," however, courts

have made clear that the reserved water rights doctrine merely confers a non-possessory use right. *See, e.g.*, *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 ("Neither sovereign nor subject can acquire anything more than a mere usufructuary right" in the water itself.). NPS previously conceded as much. *See* Brief of Respondent at 27, *Sturgeon v. Frost*, No, 14-1209 (U.S. Dec. 16, 2015) (arguing that "'[n]either sovereign nor subject can acquire anything more than a mere usufructuary right'" in navigable waters); Br. in Opp. 14 (same). Whatever "interest" a reserved water right creates, Pet.App.12a, it neither confers nor even resembles a title interest.

Unlike mineral rights, for example, a reserved water right is not an alienable property interest. *See, e.g.*, *Terry v. Terry*, 565 So. 2d 997, 1000 (La. App. 1990) (mineral rights are "alienable and heritable"). Reserved water rights are instead a limited reservation of sovereign power more akin to a navigational servitude than a title interest. *See United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28, (1961) (servitude is "power of the government to control and regulate navigable waters in the interest of commerce"); *PPL Montana*, 565 U.S. at 591 (States may "allocate and govern" beds of navigable waters "according to state law subject only to 'the paramount power of the United States to control such waters *for purposes of navigation* in interstate and foreign commerce.'") (emphasis added) (citation omitted); *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986) ("Since the United States does not hold title to the navigational servitude, the servitude is not 'public land' within the meaning of ANILCA.").

In short, even if the United States held reserved water rights in *all* of Alaska's navigable waters for *any* purpose—which it does not—those rights still would not render the Nation River or any other navigable Alaska waterway "public land" under ANILCA.[5]

B. The Hovercraft Ban Exceeds the Scope of any Reserved Water Rights the United States Might Hold.

Even if the reserved water rights doctrine applies to the Nation River in certain circumstances, the hovercraft ban exceeds the scope of whatever reserved rights the United States might hold. The doctrine is premised on the federal government's need for actual use and withdrawal of a certain volume of water; it applies where Congress sets aside land for a federal purpose but that purpose would be "entirely defeated" without the reserved water. *United States v. New Mexico*, 438 U.S. 696, 700 (1978); *see also* Pet.App.20a (concurrence below acknowledging that "[a] reserved water right is the right to a sufficient *volume*

5. Indeed, a finding that Alaska's navigable waters are "public lands" would grant NPS *more* authority over Alaska's navigable waters than it has elsewhere. The 1976 Improvement Act granted NPS only narrowly circumscribed authority over waters "located within System units." 54 U.S.C. § 100751(b). By declaring the Nation River "public land," however, the Ninth Circuit has subjected it, and all other navigable waters within Alaska CSUs, to the full array of NPS regulations under the Organic Act. This would allow NPS to impose *any* restriction it believes would "conserve the scenery, natural and historic objects, and wild-life." 54 U.S.C. § 100101(a). This is precisely the type of "topsy-turvy" interpretation of ANILCA this Court previously rejected. *Sturgeon*, 136 S. Ct. at 1071.

of water for use in an appropriate federal purpose," and "[t]his case has nothing to do with that").

Moreover, the same principles of federalism that should inform this Court's interpretation of ANILCA, *see supra* Part I.C, should also require a carefully limited application of the reserved water rights doctrine. This Court has emphasized that a "careful examination" is needed before finding an implied reservation of water "both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *New Mexico*, 438 U.S. at 701. Indeed, "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, *it has almost invariably deferred to the state law.*" *Id.* (emphasis added).

Cases where this Court has inferred the existence of a reserved right have thus involved a specific need either to exclude others from appropriating water that feeds a federal land or to ensure that the federal government has access to a sufficient volume of water to meet its statutory objectives. In *Cappaert*, for example, the Court held that the federal government was entitled to sufficient water in a pool within the Devil's Hole Monument to preserve "the scientific value of the pool as the natural habitat of the species sought to be preserved." *Cappaert*, 426 U.S. at 141; *see also Arizona v. California*, 373 U.S. 546, 599 (1963) (by creating Indian reservation in a "hot, scorching" desert, federal government reserved water rights to the extent such water was "essential to the life of the Indian people and to the animals they hunted and the crops they raised").

But this Court has never held that a reserved water right confers on the federal government plenary regulatory power over the body of water at issue. To the contrary, the Court has emphasized that "[t]he implied-reservation-of-water-rights doctrine ... reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141. The Court thus held in *Cappaert* that water use by non-federal private parties may be curtailed "*only to the extent necessary* to preserve an adequate water level at Devil's Hole." *Id.* (emphasis added). Similarly, in *New Mexico*, the Court refused to apply the reserved water rights doctrine to enable "secondary uses" of reserved federal lands; in those circumstances, the United States must "acquire water in the same manner as any other public or private appropriator." *New Mexico*, 438 U.S. at 702. Congress has appropriated NPS funds for just such purposes, *id.* (citing 16 U.S.C. § 17j-2 (1976)), and ANILCA authorizes NPS to purchase Alaskan lands, 16 U.S.C. § 3103(c); *id.* § 3192. Such statutory authorizations would be superfluous if, as the Ninth Circuit concluded, ANILCA had implicitly granted NPS plenary regulatory authority over non-federal navigable waterways in Alaska based on reserved water rights.

The Ninth Circuit's analysis disregarded these important limitations on the reserved water rights doctrine. Because protection of fish is one of ANILCA's purposes, the Ninth Circuit reasoned that *any* diminution of water within the Yukon-Charley "would necessarily impact this purpose, giving rise to a reserved water right." Pet.App.18a. At the outset, protection of fish is just one of ANILCA's purposes. The statute was also intended to "provide[] adequate opportunity for

satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d).[6] The Ninth Circuit did not even attempt to explain how the hovercraft ban would promote *that* statutory purpose; as this case demonstrates, the ban would undermine the "economic and social needs" of Alaskans by limiting their transporation options in difficult-to-navigate areas. The Ninth Circuit's myopic focus on one statutory purpose to the exclusion of all others fails to "respect and give effect to" the "compromises" and "careful balance" embodied in ANILCA. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002).

In all events, even focusing solely on the fish-protection purpose of ANILCA, that statutory goal would grant NPS the power to limit other water uses "only to the extent necessary" to protect fish, and "no more." *Cappaert*, 426 U.S. at 141. The need to protect fish could not possibly justify banning hovercraft on navigable waterways, as hovercraft float above the water on a cushion of air, *see* Alaska Admin. Code tit. 11, § 20.990(7), and have no effect on the volume of water in the river available for the fish. Neither NPS nor the Ninth Circuit has even attempted to make the showing required by this Court's precedents: that "the purposes of the [water] reservation would be entirely defeated" without the challenged policy. *New Mexico*, 438 U.S. at 700. That is likely because there is neither any claim of water scarcity within ANILCA's CSUs, *see Katie John III*, 720 F.3d at 1238, nor any

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6. Other statutory purposes ignored by the Ninth Circuit include protecting mining operations, 16 U.S.C. § 3101(d); promoting oil and gas development, *id.* § 3142; and supporting the timber industry, *id.* § 539d.

indication that ANILCA's primary purposes would be defeated if Mr. Sturgeon continued using his hovercraft on the Nation River as he has for years. Even if the reserved water rights doctrine applied to the Nation River in certain circumstances, it cannot be invoked to justify NPS's hovercraft ban.

III. NPS's Alternative Arguments Lack Merit.

In remanding this case two years ago, the Court noted that NPS had offered several alternative arguments in defense of the hovercraft ban. *See Sturgeon*, 136 S. Ct. at 1072. The Ninth Circuit affirmed on the basis of its misguided application of the reserved water rights doctrine. *See supra*. But NPS's other alternative arguments fare no better and, if accepted, would be equally destructive of Alaska's sovereignty. This Court should definitively address—and reject—those arguments.

A. First, NPS has argued that its general park-management authority under the Organic Act and its 1976 amendments supersedes ANILCA's Alaska-specific limitations. That is, NPS asserts that Section 100751(b) of the Organic Act authorizes the agency to ban hovercraft on the Nation River even if that waterway is not "public land" because the river lies within the boundaries of a CSU. *See Sturgeon*, 136 S. Ct. at 1072; Br. in Opp. 14-15.

That argument runs headfirst into the basic interpretive rule that "a specific statute controls over a general one." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). NPS's organic statute grants the agency authority to promulgate regulations regarding the use and management of "System units," which include

National Parks, National Monuments, National Historic Sites, and the like. *See* 54 U.S.C. § 100751(a) (general regulatory authority over "System units"); *id.* § 100751(b) (regulatory authority over "water located within System units, including water subject to the jurisdiction of the United States"); 16 U.S.C. § 410hh(10) (Yukon-Charley established as a "unit of the National Park Service").

In creating parks and preserves in Alaska such as Yukon-Charley, however, ANILCA expressly withheld regulatory authority from NPS with respect to State, Native Corporation, and private lands. ANILCA gave NPS a new, Alaska-specific mandate—to balance federal conservation with non-federal economic and social interests—and strictly limited NPS's regulatory authority to "public lands." 16 U.S.C. §§ 3101(d), 3103(c). NPS cannot rely on its general rulemaking authority when ANILCA expressly declares that certain lands—including those at issue here—are *not* to be considered part of the relevant "unit" subject to NPS jurisdiction.

Indeed, the specific-controls-the-general canon applies with special force where—as here—"Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel*, 566 U.S. at 645 (citation omitted); *see id.* (rejecting interpretation of statute in which "clause (iii) permits precisely what clause (ii) proscribes").[7] ANILCA's recognition of the unique status of Alaska's lands, waters,

7. *See also Doe v. Nat'l Bd. of Medical Examiners*, 199 F.3d 146, 155 (3d Cir. 1999) (plaintiff seeking to challenge written examination under Americans with Disabilities Act could not rely on ADA's general anti-discrimination provisions when other provisions expressly addressed "what [the ADA] requires in the context of examinations").

and resources is a paradigmatic example of a "specific solution" for a "specific problem" that necessarily limits NPS's general regulatory authority. "All those Alaska-specific provisions reflect the simple truth that Alaska is often the exception, not the rule." *Sturgeon*, 136 S. Ct. at 1071.

B. Finally, although the concurring judges below concluded that the reserved water rights doctrine has "nothing to do with" this case, they would have upheld the hovercraft ban directly under the Commerce Clause. Pet.App.20a-23a. The problem with that argument is that it rests on judgments *Congress itself* never made. *See, e.g., Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 635-36 (1999) (evaluating constitutionality of statute based on specific constitutional provisions invoked by Congress); *United States v. Morrison*, 529 U.S. 598, 607 (2000) (same).

Congress unquestionably possesses "significant authority to regulate activities" in navigable waters "by virtue of" its "dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power." *Alaska v. United States*, 545 U.S. 75, 116-17 (2005) (Scalia, J., concurring in part and dissenting in part). But that authority is for Congress to invoke. Federal *agencies* possess only the power Congress delegates to them. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445 (2014). If, for example, EPA enacted a regulation banning the production and sale of plastic bags despite a lack of statutory authority to do so, a court could not later uphold the rule on the ground that it was within Congress's (unexercised) Commerce Clause power.

In ANILCA, Congress invoked its Commerce Clause power only for purposes of authorizing subsistence regulation. The statute declares that "it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents." 16 U.S.C. § 3111(4). Congress did not, however, invoke the Commerce Clause to justify any of the other provisions of ANILCA.[8]

The concurrence thus badly missed the mark by noting that "ANILCA expressly left in place federal jurisdiction to regulate the navigable waters." Pet.App.21a-22a. The fact that a statute "left in place" Congress's power under the Commerce Clause—a constitutional power that was not Congress's to give away—does not answer the question of whether Congress exercised that power in the first instance. Here it did not. ANILCA did just the opposite—it cabined NPS control over non-federal navigable waters in Alaska and limited NPS's authority under the Commerce Clause to subsistence purposes. The concurrence's reasoning fares no better than the majority's.[9]

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8. The other provisions of ANILCA were likely grounded in the Property Clause, which grants Congress authority to "dispose of and make all needed Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., art. IV, sec. 3, cl. 2.

9. NPS also argued on remand that the hovercraft ban complies with Section 103(c) because it extends to both public lands and non-public lands within CSUs and therefore is not "applicable

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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solely to public lands within such units." 16 U.S.C. § 3103(c); *see also Sturgeon*, 136 S. Ct. at 1072. NPS wisely did not raise this argument in opposing review before this Court. The argument is circular and would render Section 103(c) meaningless.

No. 17-949

In the Supreme Court of the United States

JOHN STURGEON, PETITIONER

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether Section 103(c) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3103(c), withdrew the National Park Service's authority to regulate activities on all navigable waters located within units of the National Park System in Alaska.

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In the Supreme Court of the United States

No. 17-949

JOHN STURGEON, PETITIONER

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 872 F.3d 927. An earlier opinion of the court of appeals (Pet. App. 26a-57a) is reported at 768 F.3d 1066. The decision of the district court (Pet. App. 58a-81a) is not published in the Federal Supplement but is available at 2013 WL 5888230.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2017. The petition for a writ of certiorari was filed on January 2, 2018, and granted on June 18, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

This case concerns the authority of the National Park Service (NPS or Park Service) to regulate navigable waters within the National Park System in Alaska. Congress has authorized the Park Service to regulate "activities on or relating to water located within" units of the National Park System, "including water subject to the jurisdiction of the United States." 54 U.S.C. 100751(b) (Supp. IV 2016). When Congress expanded the National Park System in Alaska through the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (16 U.S.C. 3101 *et seq.*), with the aim of protecting "waters," "freeflowing rivers," and "fish," 16 U.S.C. 3101, Congress did not simultaneously strip the Park Service of all authority to regulate conduct on navigable waters within the National Park System in Alaska.

A. Statutory Background

1. The authorities of the National Park Service

The United States has reserved federal lands and waters in the National Park System ever since the creation of Yellowstone National Park in 1872. Three of the largest National Parks in Alaska—Mount McKinley National Park, Katmai National Monument, and Glacier Bay National Monument—were created between 1917 and 1925. See Act of Feb. 26, 1917, ch. 121, 39 Stat. 938; Proclamation of Sept. 24, 1918, 40 Stat. 1855; Proclamation of Feb. 26, 1925, 43 Stat. 1988. The "fundamental purpose" of the National Park System "is to conserve the scenery, natural and historic objects, and wild life in System units and to provide for the enjoyment of" those areas. 54 U.S.C. 100101(a) (Supp. IV 2016). The National Park Service Organic Act (Organic Act), ch. 408, 39 Stat. 535, authorizes the Secretary to serve that goal through a general grant

of authority to "prescribe such regulations as the Secretary considers necessary or proper for the use and management of System units." 54 U.S.C. 100751(a) (Supp. IV 2016).

In addition, since 1976, Congress has specifically authorized the Secretary to "promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States," so long as the regulations are not in derogation of the authority of the Coast Guard. Act of Oct. 7, 1976 (1976 Act), Pub. L. No. 94-458, § 1(2)(h), 90 Stat. 1939. That provision's recent recodification replaces the phrase "waters located within areas of the National Park System" with the phrase "water located within Syste m units." 54 U.S.C. 100751(b) (Supp. IV 2016). The Department of the Interior urged the enactment of the 1976 Act to respond to "recreational boating and other water-related activities that affect the resources of many areas of the National Park System." Letter of Curtis Bohlen, Deputy Assistant Sec'y of the Interior (July 23, 1976), *reprinted in* S. Rep. No. 1190, 94th Cong., 2d Sess. 12 (1976). The Department explained that the enactment would make clear Congress's "intent to invoke its powers under the Commerce Clause" in support of regulation of such activities, *id.* at 11, and clarify the Secretary's authority over the navigable waters that are also subject to Coast Guard jurisdiction, *id.* at 12.

2. ANILCA and its predecessors

ANILCA is the third in a series of major statutes addressing the allocation of lands in Alaska.

a. The Alaska Statehood Act

The Alaska Statehood Act (Statehood Act), Pub. L. No. 85-508, 72 Stat. 339, which authorized Alaska to join the Union, "permitted Alaska to select 103 million acres of 'vacant, unappropriated, and unreserved' federal land" for conveyance to the State. 136 S. Ct. 1061, 1065 (quoting Statehood Act, § 6(a) and (b), 72 Stat. 340). The Statehood Act also provided, § 6(m), 72 Stat. 343, that Alaska, like other States, would be covered by the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which generally grants States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters," as well as "the right and power to manage, administer, lease, develop, and use the said lands and natural resources." 43 U.S.C. 1311(a); see 136 S. Ct. at 1065.

b. The Alaska Native Claims Settlement Act

The United States had acquired the land that became Alaska through a treaty with Russia that did not extinguish the land tenure of Alaska Natives. See *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277 (1955). The Statehood Act also did not address aboriginal title. After the Statehood Act's passage, Alaska Natives "asserted aboriginal title to much of the same land" claimed by the State, leaving title to those lands uncertain. 136 S. Ct. at 1065; see 34 Fed. Reg. 1025 (Jan. 23, 1969). Congress sought to resolve that conflict in the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-903, 85 Stat. 688 (43 U.S.C. 1601 *et seq.*). ANCSA extinguished claims of aboriginal title, in exchange for a monetary settlement and a right of "corporations organized by groups of Alaska Natives to select 40 million acres of federal land to manage within the State." 136 S. Ct. at 1065; see 43 U.S.C. 1601, 1603(b), 1605, 1610-1615.

ANCSA also directed the Secretary to withdraw up to 80 million additional acres that the Secretary "deems are suitable for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems." 43 U.S.C. 1616(d)(2)(A). ANCSA provided for those reservations to be approved by Congress within five years, 43 U.S.C. 1616(d)(2)(D), but Congress did not act within the five-year period. Rather than allowing the designations to expire, President Carter invoked the Antiquities Act of 1906, 16 U.S.C. 431 *et seq.*, to designate the selected lands as national monuments without congressional approval. See 136 S. Ct. at 1065. The decision triggered protests, and "Congress once again stepped in to settle the controversy." *Id.* at 1066.

c. *ANILCA*

Congress enacted ANILCA to bring finality to the allocation of land in Alaska. ANILCA set aside approximately 105 million acres of additional "lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values." 16 U.S.C. 3101(a). ANILCA placed those lands in "conservation system unit[s]" (CSUs)—a term of art referring to "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument." 16 U.S.C. 3102(4).

Congress set out ANILCA's objectives expressly, making clear that Congress understood the Secretary would be able to adopt rules for the conservation of "waters," "freeflowing rivers," and "fish" in the areas it set aside. 16 U.S.C. 3101. The statute named four objectives:

- To preserve the "lands and waters" reserved by the Act for "the benefit, use, education, and inspiration of present and future generations," based on their scenic, geologic, wildlife, and other values, 16 U.S.C. 3101(a);
- To protect the reserved areas' "natural landscapes," wildlife, "resources related to subsistence needs," historical locations, "rivers, and lands," and "wilderness resource values and related recreational opportunities," including opportunities for canoeing and fishing "on freeflowing rivers," and "to maintain opportunities for scientific research and undisturbed ecosystems," 16 U.S.C. 3101(b);
- To "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so," where "consistent with management of fish and wildlife" and other principles, 16 U.S.C. 3101(c); and
- To "obviate[] * * * the need for future legislation designating" additional federal conservation lands in Alaska, 16 U.S.C. 3101(d).

Each of the 13 provisions that created or expanded a unit of the National Park System also described purposes for which the particular unit "shall be managed." 16 U.S.C. 410hh, 410hh-1. In each case, the purposes included protection of bodies of water such as rivers and lakes, protection of fish or marine mammal populations and their habitat, or a combination thereof. See *ibid.* For some areas, Congress's purposes included ensuring protection of particular identified waters. See 16 U.S.C. 410hh(1) (Aniakchak River); 16 U.S.C. 410hh(6) (Kobuk River Valley, including the Kobuk, Salmon, and other

rivers); 16 U.S.C. 410hh(8) (Noatak River); 16 U.S.C. 410hh(10) ("the entire Charley River basin").

Congress directed that the Secretary "shall administer the lands, waters, and interests therein" within new and expanded National Parks "as new areas of the National Park System" under the Organic Act "as amended and supplemented (16 U.S.C. 1 et seq.)." 16 U.S.C. 410hh-2. The 1976 Act authorizing regulation of activities on or relating to water in the National Park System was an amendment to the Organic Act. See § 1, 90 Stat. 1939 (amending 16 U.S.C. 1a-1 *et seq.* (1976)).

Congress also set out Alaska-specific directives with which the Park Service was required to comply when regulating fishing and boating in the new and expanded areas. See 16 U.S.C. 410hh-2, 1110(a), 3121, 3170(a).

Subsistence-Use Priority On "Public Lands." ANILCA created a priority for rural subsistence users of fish and wildlife by providing that on "public lands" in Alaska on which subsistence use is authorized, the taking of fish and wildlife for non-wasteful subsistence uses "shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114. ANILCA gave the State the option of controlling implementation of the priority, by providing that if the State "enact[ed] and implement[ed] laws of general applicability" containing the "definition, preference, and participation specified in" ANILCA, the federal government would not implement its own subsistence-use priority on "public lands." See 16 U.S.C. 3115(d).

Section 103(c) of ANILCA. When Congress created new CSUs in ANILCA, it drew the boundaries to "'follow hydrographic divides or embrace other topographic or natural features'" instead of "map[ping] the Federal

Government's landholdings." 136 S. Ct. at 1066 (quoting 16 U.S.C. 3103(b)). "As a consequence," CSUs in Alaska included "over 18 million acres of state, Native Corporation, and private land," in addition to "the Federal Government's landholdings." *Ibid.*

ANILCA Section 103(c), in three sentences, addresses the status of such lands. First, it states that only "public lands" within the borders of a CSU "shall be deemed to be included as a portion of such unit." 16 U.S.C. 3103(c). Public lands are "lands" and "waters," and also "interests therein" to which the United States holds title, excluding lands selected for transfer to the State or Native Corporations. 16 U.S.C. 3102(1)-(3); see 16 U.S.C. 3103(c).

Second, Section 103(c) provides that no lands "conveyed to the State, to any Native Corporation, or to any private party" shall be subject to those "regulations applicable solely to public lands within such units." 16 U.S.C. 3103(c).

Third, Section 103(c) provides that "[i]f the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly." 16 U.S.C. 3103(c).

Section 103(c) was added to ANILCA through a concurrent resolution to make technical "corrections," after ANILCA had been passed by both the Senate and House of Representatives. H.R. Con. Res. 452, 96th Cong., 2d Sess. (1980) (94 Stat. 3688). The resolution's sponsor in the House explained that the resolution would not "change any of the major features of" ANILCA or "have the effect of altering provisions related to conservation areas" in Alaska. 126 Cong. Rec.

30,498 (1980) (statement of Rep. Udall). The resolution was passed with unanimous consent in both the Senate and the House. See *id.* at 30,495-30,500, 31,108-31,109.

3. Regulation of navigable waters in the National Park System following enactment of ANILCA

After ANILCA was enacted, the Park Service continued to regulate activities on navigable waters within CSUs in Alaska. For instance, the Park Service adopted park-specific rules governing activities on particular navigable waters in National Parks. See, *e.g.*, 36 C.F.R. 7.46(b) and (c) (1982) (rules for Naknek Lake and Naknek River in Katmai National Park); NPS, U.S. Dep't of the Interior, *Katmai National Park and Preserve Management Plan* 53 (1986)[1] (explaining that Naknek Lake and Naknek River are navigable). Park management plans created under ANILCA, see 16 U.S.C. 3191(a), likewise stated that the Park Service was responsible for "manag[ing] all waters within the boundaries" of the National Parks to protect fish and wildlife, as well as their habitats, in cooperation with the State. See, *e.g.*, NPS, U.S. Dep't of the Interior, *Gates of the Arctic General Management Plan* 106 (1986).[2]

The Secretary also promulgated regulations, since ratified by Congress, that reflect the understanding that ANILCA allows regulation of activities on navigable waters within CSUs. The question whether "public lands" include navigable waters arose when the Secretary promulgated regulations to implement ANILCA's

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[1] https://parkplanning.nps.gov/showFile.cfm?projectID=34515&MIMEType=application%252Fpdf&filename=KATM%20GMP%2Epdf&sfid=97151.

[2] https://www.nps.gov/gaar/learn/management/upload/GAAR_GMP-Land-Protection-Plan-Wilderness-Suitability-1986.pdf.

subsistence-use priority, which applies only on "public lands." In litigation over the scope of the subsistence-use priority, the Ninth Circuit agreed with the Secretary that ANILCA's definition of "public lands" permits application of the subsistence-use priority on those navigable waters inside park boundaries as to which the federal government has a reserved-water-right interest. *Alaska* v. *Babbitt*, 72 F.3d 698, 703-704 (9th Cir. 1995) (*Katie John I*), cert. denied, 516 U.S. 1036, and 517 U.S. 1187 (1996).

The Secretary implemented that understanding through regulations. 50 C.F.R. 100.3(b); see 64 Fed. Reg. 1276, 1279 (Jan. 8, 1999); see also 62 Fed. Reg. 66,216, 66,217-66,218 (Dec. 17, 1997). The regulations identified reserved-water-rights interests in navigable waters within CSUs in Alaska. 64 Fed. Reg. at 1276, 1279, 1286-1287.

Congress then ratified that understanding. Congress initially delayed full implementation of the regulations providing for "public lands" to include such waters, in order to allow Alaska to enact an ANILCA-compliant subsistence-use priority for "public lands."[3] That would have obviated the need for the federal regulations. See 16 U.S.C. 3115(d).

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[3] See Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. I, § 101(c) [tit. III, § 336], 110 Stat. 1321-210; Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, Tit. III, § 316(a), 111 Stat. 1592; Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(e) [tit. III, § 339(a)], 112 Stat. 2681-295.

Congress ultimately provided, however, that if Alaska did not enact a measure to implement ANILCA's subsistence-use priority "before October 1, 1999," the moratorium provision limiting the geographic scope of the subsistence-use regulations would be repealed, allowing the Secretary's definition of "public lands" to take effect. Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(e) [tit. III, § 339(b)], 112 Stat. 2681-296. Alaska did not enact a measure to implement ANILCA's subsistence-use priority. Accordingly, the subsistence-use regulations became operative. See 16 U.S.C. 3102 note.

In addition, in nationwide regulations issued in 1996, the Park Service made clear that park rules apply on all "'[w]aters subject to the jurisdiction of the United States,' includ[ing] navigable waters," within "the boundaries of [the] National Park System." 61 Fed. Reg. 35,133 (July 5, 1996) (citation omitted); see 36 C.F.R. 1.2(a)(3). The Park Service explained that the rulemaking "clarifies and interprets existing NPS regulatory intent, practices and policies." 61 Fed. Reg. at 35,133 (discussing history).

In promulgating those regulations, the Secretary considered and rejected Alaska's submission that "ANILCA § 103(c) preempts NPS's well-established authority on navigable waters," and that it was therefore improper for the Secretary to regulate navigable waters within units of the National Park System in Alaska. 61 Fed. Reg. at 35,135. The Secretary emphasized that Section 103(c), which had been "characterized by Congress as a minor technical provision," should not "be read in isolation from the context of the whole act." *Ibid.* Interpreting ANILCA in a manner "consistent with its underlying protective purposes," including "to protect objects

of ecological * * * interest," the Secretary rejected Alaska's argument. *Ibid.*

The Secretary has also construed Section 103(c) as inapplicable in the rare cases in which Park Service rules are validly written to apply to non-public as well as public lands. See 59 Fed. Reg. 65,948, 65,950 (Dec. 22, 1994). The Secretary explained that such regulations are not barred by the prohibition in Section 103(c) because they do not apply "solely to public lands within" the National Park System. *Ibid.* (quoting 16 U.S.C. 3103(c)).

4. Current regulation of navigable waters in the National Park System

The Park Service has issued a number of general rules that govern activities on waters within the units of the National Park System, including in Alaska. These rules apply within "[t]he boundaries of federally owned lands and waters administered by the National Park Service" and on "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters * * * without regard to the ownership of submerged lands." 36 C.F.R 1.2(a). The rules include requirements relating to pollution and sanitation, *e.g.*, 36 C.F.R. 2.14, 3.13, introduction and removal of fish, plants, and wildlife, *e.g.*, 36 C.F.R. 2.1, 2.2, 2.3, 2.5, sanitation and noise standards for boats and other vessels, *e.g.*, 36 C.F.R. 3.1-3.19, and, as relevant here, a bar on "operation or use of hovercraft," 36 C.F.R. 2.17(e). The Park Service issued the hovercraft rule after determining that the crafts "introduce a mechanical mode of transportation

into locations where the intrusion of motorized equipment by sight or sound is generally inappropriate." 48 Fed. Reg. 30,252, 30,258 (June 30, 1983).[4]

B. Proceedings In This Case

1. In 2007, Park Service rangers observed petitioner repairing a hovercraft inside the Yukon-Charley Rivers National Preserve (Preserve), a unit of the National Park System in Alaska. Petitioner was on a gravel bar adjoining the Nation River, a navigable tributary of the Yukon. Pet. App. 31a & n.1. The rangers warned petitioner that he could not operate his hovercraft in the Preserve. *Id.* at 31a. Petitioner protested that Park Service rules could not be enforced on the Nation River within the Preserve on the ground that navigability of the Nation River makes the river immune from Park Service regulation. Pet. App. 3a, 31a. Nevertheless, he removed his hovercraft, and refrained from using it in the Preserve during the next two hunting seasons. *Id.* at 31a-32a.

2. In 2011, petitioner filed suit challenging the Park Service's authority to enforce its park rules on navigable waters within the National Park System in Alaska. He contended that Section 103(c) of ANILCA stripped the Park Service of any ability to regulate conduct on such waters. Pet. App. 30a, 59a-60a. Petitioner sought

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[4] Neither petitioner, nor Alaska, nor any other party has petitioned the Park Service to create an Alaska-specific exception to the hovercraft rule, or otherwise argued that the rule should not be applied in the State because it is not suited to Alaska's conditions. Instead, petitioner and Alaska have argued throughout this litigation that the Secretary simply lacks authority to regulate any activity on navigable waters within National Park System boundaries, and that the hovercraft rule is invalid on that basis.

declaratory and injunctive relief permitting hovercraft use on the Nation River within the Preserve. *Ibid.*

The district court granted summary judgment to the government. Pet. App. 58a-81a. The court concluded that petitioner's challenge failed even if petitioner were correct in his assertion that the navigable waters of the Nation River are state-owned. It read Section 103(c) to limit only the Park Service's authority to impose *Alaska-specific* rules, emphasizing that Section 103(c) limits only regulations "applicable solely to public lands within [conservation system] units," and that "conservation system units" is a term that refers only to units of the National Park System *in Alaska*. *Id.* at 79a-80a (citation omitted).

3. The court of appeals affirmed on the same basis. Pet. App. 26a-57a.

4. This Court granted a writ of certiorari and vacated the court of appeals' decision. 136 S. Ct. at 1064, 1072. The Court concluded that Section 103(c) should not be understood as a prohibition on Alaska-specific regulations. It stated that the lower courts' reading "may be plausible in the abstract," but that "[s]tatutory language 'cannot be construed in a vacuum,'" and must instead be read in "'context and with a view to [the words'] place in the overall statutory scheme.'" *Id.* at 1070 (citation omitted). Looking to the overall scheme, the Court noted that ANILCA "repeatedly recognizes that Alaska is different," *ibid.*, and contains numerous "Alaska-specific provisions," *id.* at 1071. That statutory context made it "implausible" that Congress designed Section 103(c) to prohibit the Park Service from adopting rules or exceptions "recognizing Alaska's unique conditions." *Ibid.*

The Court observed that the government, in defending the hovercraft rule, had principally relied "on very different arguments * * * that it has longstanding authority to regulate waters within federally managed preservation areas, and that Section 103(c) does not take any of that authority away." 136 S. Ct. at 1069. The Court "d[id] not decide" the issues raised by those arguments. *Id.* at 1072. Instead, it stated, the court of appeals could address on remand whether the portions of the Nation River within the National Park System qualify as "public land" for purposes of ANILCA and "whether the Park Service has authority under Section 100751(b) to regulate [petitioner's] activities on the Nation River, even if the river is not 'public' land." *Ibid.*

5. A unanimous panel of the court of appeals rejected petitioner's challenge on the first of those grounds. Pet. App. 1a-19a. The court observed that under longstanding circuit precedent, "ANILCA's definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Id.* at 12a (citation and internal quotation marks omitted); see *id.* at 12a-13a. Accordingly, the court observed, it had upheld application on navigable waters of a subsistence-use priority that only applies on "public lands" under ANILCA. *Id.* at 12a-13a. The court also concluded that application of the hovercraft rule served the purposes "for which ANILCA reserved lands as conservation system units." *Id.* at 14a. Because those conclusions sufficed to defeat petitioner's challenge, the panel did not address whether the Park Service's authority to issue rules "concerning boating and other activities on or relating to water located

within System units, including water subject to the jurisdiction of the United States," 54 U.S.C. 100751(b) (Supp. IV 2016), is applicable only on "public lands."

Judge Nguyen, joined by Judge Nelson, also concurred. Pet. App. 20a-23a. The concurring judges stated that in the absence of circuit precedent, they would have upheld the Park Service's application of the hovercraft rule to the waters here based on the federal navigational servitude, rather than reserved water rights. *Ibid.*

SUMMARY OF ARGUMENT

ANILCA created and expanded National Parks, Wild and Scenic Rivers, Wildlife Refuges and other federal preserves in Alaska for stated purposes that include protecting "freeflowing rivers," "waters," and fish. 16 U.S.C. 3101. Section 103(c) of that same enactment did not deprive the Park Service of its ability to execute that directive by regulating conduct on navigable waters.

A. 1. Congress has authorized the Park Service to regulate conduct on the navigable waters flowing through the National Park System by enacting a water-focused provision directly addressing navigable waters. That provision states that the Park Service may make rules "concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States." 54 U.S.C. 100751(b) (Supp. IV 2016). Navigable waters are the paradigmatic "water subject to the jurisdiction of the United States." *Ibid.*

2. ANILCA Section 103(c) does not strip the Park Service of that authority in Alaska. Petitioner relies on the portion of Section 103(c) providing that only "public lands" should be "deemed to be included as a portion of

[a conservation system] unit." 16 U.S.C. 3103(c). But regardless of whether navigable waters within the boundaries of the National Park System are public lands "deemed to be included as a portion of [a conservation system] unit," the Secretary's regulation of hovercraft use and other activities on the Nation River within the Preserve is regulation of "activities on * * * water located within System units." 54 U.S.C. 100751(b) (Supp. IV 2016). ANILCA makes clear that even non-public lands are located "within System units," as relevant to 1976 Act authority. See 16 U.S.C. 3191(b)(7); 16 U.S.C. 3103(c).

In any event, the Park Service's authority to regulate conduct on navigable waters under the 1976 Act does not depend on whether navigable waters are themselves located "within" conservation system units, because the 1976 Act authorizes rules for activities not only "on" water located within System units but also "*relating to* water located within System units." 54 U.S.C. 100751(b) (Supp. IV 2016) (emphasis added). There is no dispute that all non-navigable stretches of water on federal land within units of the National Park System constitute "water located within System units." *Ibid.* And regulations that apply on the navigable waters running through such units are, at minimum, regulations "relating to" the non-navigable stretches with which they interconnect.

3. Petitioner errs in arguing (Br. 42) that by specifying the areas that are "deemed a portion of" CSUs, Section 103(c) strips the Park Service of authority over all other lands and waters. The sentence on which petitioner relies is simply definitional. And petitioner's reading of that sentence as a substantive bar to Park Service regulation is countermanded by the very next

sentence of Section 103(c). That sentence states that state, Native Corporation and private lands—lands that are not "public lands"—cannot be subject to one particular class of Park Service regulations: the "regulations applicable *solely to public lands* within such [conservation system] units." 16 U.S.C. 3103(c) (emphasis added). Petitioner's argument would make superfluous the tailored prohibition that Section 103(c) actually contains. Petitioner's reading is equally incompatible with ANILCA's provisions concerning park management plans, which direct the Park Service to consider "issuance or enforcement of regulations" for "privately owned areas" within the National Park System. 16 U.S.C. 3191(b)(7). That provision recognizes that the Secretary's regulatory authority is not limited to "public lands" within CSUs.

B. Park Service regulation of petitioner's conduct on the navigable waters of the Nation River within the Preserve would be consistent with ANILCA even if the Park Service were limited to regulating "public lands" under ANILCA.

ANILCA defines "public lands" to include not only "lands" and "waters" but also "interests therein" to which the United States holds title. 16 U.S.C. 3102(1)-(3). ANILCA's definition encompassing "interests" is particularly important with respect to navigable waters because it is *only* possible to hold interests in navigable waters; "neither sovereign nor subject" can own the waters themselves. *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954).

The United States holds interests in navigable waters in the National Park System in Alaska under the reserved-water-rights doctrine. That doctrine provides

that when the government reserves land, it also reserves an interest in appurtenant waters when "needed to accomplish the purpose" of the federal reservation. *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976). There is no dispute that the reservation of lands in Alaska as units of the National Park System carried with it a reservation of water rights. Congress created the National Parks in Alaska for purposes that expressly include safeguarding waters, protecting aquatic wildlife, providing opportunities for marine recreation, and preserving opportunities for subsistence uses such as fishing. 16 U.S.C. 3101; see 16 U.S.C. 410hh, 410hh-1. This Court has concluded that comparable provisions reserve rights in appurtenant waters. *Cappaert*, 426 U.S. at 141; *United States* v. *New Mexico*, 438 U.S. 696, 709-710 (1978). And the Secretary has determined in regulations that the federal title to lands reserved under ANILCA includes reserved water rights in navigable waters in the National Park System.

If any ambiguity existed at the time of ANILCA's passage as to whether navigable waters may be subject to rules for "public lands," Congress removed that ambiguity when it ratified the regulations on that topic. Congress initially delayed the implementation of subsistence-use regulations in which the Secretary determined that the government could impose rules for "public lands" on specified navigable waters based on the federal reserved-water-right interest. That delay gave Alaska time to enact an ANILCA-compliant subsistence-use priority, which would have obviated the need for the federal subsistence-use regulations. But Congress directed that if Alaska failed to enact such a priority by a particular date, the moratorium would be repealed, enabling the regulations defining the priority's

geographic scope to take effect. Accordingly, when Alaska failed to act, the Secretary's regulations construing "public lands" were implemented. This ratification through positive legislation is "virtually conclusive" evidence of the meaning of Section 103(c). *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986).

C. This Court has emphasized that Section 103(c) should not "be considered in a vacuum," and that its words should "be read in their context and with a view to their place in the overall statutory scheme." 136 S. Ct. at 1070 (citation omitted).

Here, ANILCA as a whole leaves no doubt that Section 103(c) did not eliminate Park Service authority to regulate conduct on navigable waters in the National Park System. Congress repeatedly stated in ANILCA that by placing new areas under Park Service authority, it intended to protect and preserve their rivers and waters. 16 U.S.C. 3101. ANILCA also identified particular navigable waters that it intended to protect. 16 U.S.C. 410hh. These provisions refute petitioner's contention that ANILCA Section 103(c)—which nowhere mentions navigable waters—stripped the Park Service of its authority to protect navigable waters within the National Park System.

ANILCA's subsistence-use provisions also confirm the Park Service's authority. Congress stated that it was the "intent and purpose" of ANILCA, 16 U.S.C 3101(c), that its subsistence-use priority enable rural residents who engaged in "customary and traditional fishing activities" to continue to do so, 16 U.S.C. 3113(c). ANILCA did so by authorizing subsistence fishing within new and expanded units of the National Park System and directing that subsistence fishing be given

priority over non-subsistence uses on the "public lands" where subsistence uses are authorized. 16 U.S.C. 410hh-2, 3114. Those provisions confirm that "public lands" include navigable waters. ANILCA would not ensure that rural residents engaged in traditional subsistence fishing could maintain a subsistence way of life unless the priority applied on navigable waters, because customary and traditional subsistence fishing takes place on navigable waters, rather than non-navigable ones. *Alaska* v. *Babbitt*, 72 F.3d 698, 702 (9th Cir. 1995) (*Katie John I*), cert. denied, 516 U.S. 1036 and 517 U.S. 1187 (1996).

ANILCA is shot through with other provisions demonstrating that the Park Service retains authority to regulate conduct on the navigable waters within CSUs. For example, the statute designates a number of navigable waters "wild and scenic rivers," to be administered under the "general statutory authorities relating to areas of the national park system" to "protect and enhance the values which caused [the rivers] to be" designated. 16 U.S.C. 1281. Those designations would not make sense if ANILCA stripped the Park Service of authority to regulate navigable waters. ANILCA's rules limiting Park Service regulation of certain motorboat use and commercial fishing, among others, also demonstrate that Section 103(c) did not strip the Park Service of regulatory authority over navigable waters altogether.

D. The enactment of Section 103(c) as a correction placed within the statute's "Maps" section confirms that the provision is not a sweeping withdrawal of Park Service authority. Congress would not have enacted a major reworking of Park Service authority as a subsection in a provision principally focused on the availability of

physical maps and "minor" adjustments of boundary lines. 16 U.S.C. 3103(c). The manner in which Congress enacted Section 103(c) confirms this point. There is no question that when initially passed by both Houses, ANILCA left in place the Park Service's authority to make rules protecting the navigable waters within National Parks. Congress then added Section 103(c) through a unanimous-consent concurrent resolution whose text explained that it contained only "corrections." H.R. Con. Res. 452, 96th Cong., 2d Sess. (1980) (94 Stat. 3688). That would not be an apt description of the major rescission of Park Service power that petitioner urges.

Moreover, Section 103(c) was described as one of several "minor revisions," 126 Cong. Rec. at 30,498, that were "technical" and "non-controversial," 125 Cong. Rec. at 11,156, and would not "change any of the major features of" the statute, 126 Cong. Rec. at 30,498. No Member of Congress suggested that the provision would rescind the Park Service's authority to regulate conduct on all the navigable waterways flowing through the National Park System in Alaska. On the contrary, Members of Congress repeatedly indicated that they understood ANILCA would allow the Park Service to protect the rivers within the National Park System in Alaska.

E. Petitioner errs in contending that Section 103(c) should be read to strip the Park Service of authority to regulate navigable waters based on a clear-statement rule. Both the 1976 Act and ANILCA make abundantly clear that the Park Service retains its authority to regulate conduct on navigable waters within Alaska. And in any event, no clear-statement rule applies to federal regulation of conduct on navigable waters—let alone navigable waters within the National Park System.

F. Text, structure, and history demonstrate that petitioner's construction of Section 103(c) is incorrect. But if they did not, the Secretary's reasonable regulations would resolve any remaining ambiguity under principles of *Chevron* deference. The Secretary has adopted regulations through notice-and-comment procedures that make Park Service rules applicable on navigable waters within the National Park System, including within Alaska. In doing so, the Secretary considered and rejected the argument that Section 103(c) "should be interpreted as superseding NPS authority" over navigable waters within Alaska under the 1976 Act, after determining that such a reading was not consistent with the statutory scheme or with ANILCA's express objectives. 61 Fed. Reg. at 35,135. The Secretary's conclusion is, at a minimum, a reasonable one that is entitled to deference.

ARGUMENT

THE PARK SERVICE MAY REGULATE ACTIVITIES ON THE NAVIGABLE WATERS WITHIN THE NATIONAL PARK SYSTEM IN ALASKA

Congress established the National Park System to preserve the natural resources contained in System units, such as rivers, fish, and plant life, and to enable the public to enjoy those resources. 54 U.S.C. 100101(a) (Supp. IV 2016). Congress did not depart from those aims when it set aside areas as units of the National Park System in Alaska under ANILCA. On the contrary, Congress expressly stated in ANILCA that it was creating and expanding areas of the National Park System for purposes that included protecting those areas' "freeflowing rivers," "waters," and "fish," 16 U.S.C. 3101, and it identified particular navigable bodies of water that it intended to protect, see 16 U.S.C. 410hh. For

instance, it created the Preserve here to protect "the environmental integrity of the entire Charley River basin," including "lakes" and "streams," as well as to protect "habitat for, and populations of, fish." 16 U.S.C. 410hh(10).

ANILCA was atypical in one respect, however. When it drew boundaries based on topographic and other natural features, "rather than to map the Federal Government's landholdings," ANILCA brought within park boundaries millions of acres of lands that had been conveyed, or selected for conveyance, to the State, Native Corporations, and private landholders. 136 S. Ct. at 1066.

The provision on which petitioner relies in this case, Section 103(c) of ANILCA, limits the Park Service's authority to regulate these lands, but it does not strip the Park Service of its authorities to regulate activities on the waters, including the navigable waters, in National Parks. Petitioner's argument to the contrary rests on two mistaken premises: First, that the Secretary's authority to regulate activities on navigable waters within the National Park System in Alaska is limited to regulating waters that qualify as "public lands" under ANILCA, and second, that the United States lacks a property interest in navigable waters within the National Park System, and therefore may not regulate those waters as "public lands" under Section 103(c).

A. Park Service Rules Governing Conduct On Navigable Waters Are Valid Without Regard To Whether The United States Holds A Property Interest That Supports Classification Of Those Waters As "Public Lands" Under ANILCA

The Park Service's regulation of conduct on navigable waters within National Park System areas is authorized under the 1976 statute expressly authorizing such regulation—an authority unaffected by whether such navigable waters qualify as "public lands" under ANILCA.

1. The 1976 Act authorizes the Park Service to regulate activities occurring on navigable waters within the National Park System

In 1976, Congress enacted legislation specifically granting the Secretary authority to regulate conduct "on or relating to" waters within the National Park System, including navigable waters. 54 U.S.C. 100751(b) (Supp. IV 2016). As currently codified, the 1976 Act provides that the Secretary may "[p]rescribe regulations * * * concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States," so long as the Secretary's regulations are not in derogation of the authority of the Coast Guard. *Ibid.* Navigable waters are the paradigmatic "water subject to the jurisdiction of the United States." See, *e.g.*, *In re Garnett*, 141 U.S. 1, 15-16 (1891); *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1852); see also 33 C.F.R. 2.38 ("Navigable waters of the United States" are "[w]aters subject to the jurisdiction of the United States") (emphasis omitted).

There is no dispute that, in the National Park System in every State other than Alaska, this authorization

fully supports sanitation and noise standards for boats and other vessels, *e.g.*, 36 C.F.R. 3.1-3.19, rules concerning pollution and sanitation, *e.g.*, 36 C.F.R. 2.14, 3.13, constraints on introduction and removal of fish, plants, and wildlife, *e.g.*, 36 C.F.R. 2.1, 2.2, 2.3, 2.5, and, as relevant here, a bar on "operation or use of hovercraft," 36 C.F.R. 2.17(e), on navigable waters, 36 C.F.R 1.2(a), as well as on the non-navigable waters on federally owned lands.

2. Section 103(c) does not strip the Park Service of its 1976 Act authorities on navigable waters in Alaska

Section 103(c) does not abrogate throughout Alaska the Park Service's authority to regulate activities on or relating to navigable waters under the 1976 Act. Petitioner rests his argument for abrogation (Br. 41-42) on the sentence of Section 103(c) providing that "[o]nly those lands within the boundaries of any conservation system unit which are public lands * * * shall be deemed to be included as a portion of such unit." 16 U.S.C. 3103(c). But even if "navigable waters" are not "public lands," the Park Service's authority to regulate navigable waters under the 1976 Act would remain intact.

First, regardless of whether navigable waters within the boundaries of CSUs are "deemed to be included as a *portion of* [a conservation system] unit" under Section 103(c), 16 U.S.C. 3103(c) (emphasis added), the Secretary's application on navigable waters within park boundaries of rules concerning hovercraft (and other subjects) would be regulation of "activities *on* * * * water located *within* System units"—as relevant to 1976 Act authority. 54 U.S.C. 100751(b) (Supp. IV 2016) (emphasis added). The 1976 Act expressly provides that the "water located within System units[] includ[es] water

subject to the jurisdiction of the United States," *ibid.*, like navigable waters, see, *e.g.*, *Garnett*, 141 U.S. at 15-16.

Petitioner suggests (Br. 41-42) that ANILCA Section 103(c) provides "more specific" direction excluding navigable waters. But the 1976 Act provides the most specific guidance on whether navigable waters (that is, "water subject to the jurisdiction of the United States") constitute "water located within System units." And ANILCA expressly directs that new and expanded CSUs be governed by the 1976 Act, by directing the Secretary to administer those units under the "Organic Act, as amended and supplemented." 16 U.S.C. 410hh. The 1976 Act is an amendment to the Organic Act. 1976 Act § 1, 90 Stat. 1939. ANILCA Section 103(c), in contrast, does not mention navigable waters.

Moreover, ANILCA Section 103(c) does not contradict the 1976 Act's authorization. ANILCA treats the areas that are "within" System units—to which the 1976 Act refers—as broader than the areas that are "deemed to be included as a portion of" System units. 16 U.S.C. 3103(c). Thus, the first sentence of Section 103(c) provides that "[o]nly those areas *within the boundaries* of any conservation system units" that are "public lands" "shall be deemed to be included as a portion of such unit." *Ibid.* (emphasis added). The boundaries of the unit thus encompass more than its public lands. Further, the second sentence of Section 103(c) itself provides that state, Native Corporation, and private inholdings shall not "be subject to the regulations applicable *solely to public lands within such units*." *Ibid.* (emphasis added). The second sentence's acknowledgment that certain rules apply "solely to public lands

within [conservation system] units" reflects the understanding that not *all* lands "within" CSUs are public lands. *Ibid.*

Congress confirmed as much in the portion of ANILCA that directs the Secretary to promulgate a management plan for each CSU that contains a description "of privately owned areas, if any, which are *within such unit.*" 16 U.S.C. 3191(b)(7) (emphasis added). That provision again demonstrates that even non-public lands—such as "privately owned areas"—fall "within" CSUs, as relevant to 1976 Act authority. *Ibid.*

Second, the Secretary's authority to regulate activities on navigable waters under the 1976 Act does not depend on whether navigable waters are "within" CSUs, because the 1976 Act authorizes rules for activities not only "on" water located within System units, but also "*relating to* water located within System units." 54 U.S.C. 100751(b) (Supp. IV 2016) (emphasis added). The ordinary meaning of "relating to" is "expansive[]." *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1760 (2018) (citing *Coventry Health Care of Mo., Inc.* v. *Nevils*, 137 S. Ct. 1190, 1197 (2017); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-390 (1992); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139 (1990)). "Congress characteristically employs the phrase to reach any subject that has 'a connection with, or reference to' the topics the statute enumerates." *Coventry*, 137 S. Ct. at 1197 (citation omitted).

Regulations that apply to navigable waters within the boundaries of the National Park System are regulations "relating to" waters within the National Park System, even setting aside whether navigable waters are themselves "within" the CSUs. Petitioner does not dispute that all the *non-navigable* stretches of water on

federally owned lands within CSUs constitute "water located within System units," 54 U.S.C. 100751(b) (Supp. IV 2016). And navigable and non-navigable waters are interconnected. Indeed, whether a waterway is navigable often varies from stretch to stretch: navigability determinations are made "on a segment-by-segment basis," so that a single body of water can transition into and out of navigability depending on the "[p]hysical conditions that * * * often vary significantly over the length of a river." *PPL Mont., LLC* v. *Montana*, 565 U.S. 576, 593-595 (2012).

Regulations of activities on navigable stretches are, at minimum, regulations *relating to* those interconnected non-navigable waters, because regulating navigable stretches protects the integrity and enjoyment of navigable and non-navigable stretches alike. See 54 U.S.C. 100101(a) (Supp. IV 2016) (describing the Park System's "fundamental purpose" as to "conserve the scenery, natural and historic objects, and wild life in System units and to provide for the enjoyment of" the same). Thus, rules on navigable waterways that control such matters as sanitation, pollution, and noisy and visually obtrusive modes of transportation, see 48 Fed. Reg. at 30,258 (hovercraft rule), have a connection to, and effect on, the condition and enjoyment of the interwoven non-navigable stretches. See, *e.g.*, *Ingersoll-Rand Co.*, 498 U.S. at 139 (explaining that a law would "'relate[] to'" an employee benefit plan "even if the law is not specifically designed to affect such plans, or the effect [on such plans] is only indirect," if the law nevertheless "'has a connection with or reference to such a plan'") (citation omitted).

3. Petitioner's contrary arguments are incompatible with ANILCA's text

Petitioner argues (Br. 42) that the specification in the first sentence of Section 103(c) of the land "deemed to be included as a portion of [a conservation system] unit," 16 U.S.C. 3103(c), strips the Park Service of all authority to regulate land that is *not* deemed a portion of a CSU. But that is not what the first sentence says. That sentence is only definitional. And petitioner's reading is directly countermanded by the very next sentence of Section 103(c). That sentence provides that state, Native Corporation and private lands—lands that are not "public lands"—cannot be subject to one particular class of Park Service regulations: the "regulations applicable *solely to public lands* within such [conservation system] units." 16 U.S.C. 3103(c) (emphasis added). That tailored limitation confirms that non-public lands are not exempted from *all* Park Service regulations. Indeed, if the definition specifying what lands are "deemed to be included" in a CSU by itself prohibited the Park Service from regulating non-public lands, the prohibition on applying to state, Native Corporation, and private lands the "regulations applicable solely to public lands within" CSUs would be superfluous.

Petitioner's interpretation flouts other parts of ANILCA as well. ANILCA directs the Park Service to consider "issuance or enforcement of regulations" governing activities in "privately owned areas" within the boundaries of National Parks in Alaska, when needed to serve the purposes of the System unit. 16 U.S.C. 3191(b)(7). Congress would not have directed the Park Service to consider "issu[ing] or enforc[ing]" regulations for activities in privately owned areas if Section 103(c) barred the Secretary from issuing or enforcing

such regulations. *Ibid.* Petitioner has sought to explain this provision by stating that perhaps Congress meant the Secretary could *acquire* the private land. 14-1209 Reply Br. 3-4. But a provision directing the Secretary to consider "issuance or enforcement of regulations" for the "activities carried out in, or proposed for," "privately owned areas" is not plausibly read as a provision actually directing the Secretary to consider acquiring private lands.

Petitioner has previously argued that Section 103(c) would be "meaningless" unless it exempted non-public lands from all Park Service regulation. 14-1209 Reply Br. 3; see Alaska Amicus Br. 36. Petitioner thus has argued that unless Section 103(c) bans the application on non-public lands of all Park Service regulations, rather than only "regulations applicable solely to public lands," 31 U.S.C. 3103(c), "NPS could evade any limit on its authority merely by extending a regulation to both federal and nonfederal lands." 14-1209 Reply Br. 3.

That is wrong. ANILCA's directive that certain lands not be deemed a portion of the conservation system unit substantially constrains the Park Service's authority. The Organic Act allows the Park Service to make only rules that are "necessary or proper for the use and management of System units," 54 U.S.C. 100751(a) (Supp. IV 2016). And, as more specifically relevant here, the 1976 Act authorizes the Park Service only to issue regulations governing boating and other activities on or relating to covered waters. 54 U.S.C. 100751(b) (Supp. IV 2016). Accordingly, Section 103(c) means that the Park Service's authority over non-public lands within CSUs is limited to imposing certain water-related rules and those rules "necessary or proper for

the use and management of" the public lands themselves—most notably, rules regarding activities on non-public lands that pose hazards for the public lands. 54 U.S.C. 100751(a) (Supp. IV 2016); see 36 C.F.R. Pt. 6 (rules regarding solid-waste disposal sites made applicable on all lands within National Park System boundaries); 36 C.F.R. 9.1 (rules regarding mining made applicable on all lands within National Park System boundaries); see also, *e.g.*, *Kleppe* v. *New Mexico*, 426 U.S. 529, 537-538 (1976) (explaining that rules for conduct on private lands adjoining federal lands may be appropriate to safeguard wildlife or ecological features of federal lands, under the Property Clause). Petitioner's suggestion that giving the language of Section 103(c) its ordinary meaning would leave the Park Service with "unfettered authority" to regulate state, Native Corporation, and private lands, 14-1209 Reply Br. 4-5, is incorrect.

B. In Any Event, The Park Service May Enforce Regulations Of "Public Lands" On Navigable Waters Within The National Park System In Alaska

Even if Section 103(c) were read to strip the Park Service of all authority over lands that are not "public lands," the regulations here would be valid, because of the federal property interest in navigable waters under the reserved-water-rights doctrine.

1. The Park Service's regulations of navigable waters are regulations of "public lands" under ANILCA because of the federal interest in those waters

ANILCA defines "public lands" as lands, waters, and "interests therein" to which the United States holds title. 16 U.S.C. 3102(1)-(3). Accordingly, federal authority over "public lands" extends to circumstances in which the United States holds "interests" in land or water.

Amoco Prod. Co. v. *Village of Gambell*, 480 U.S. 531, 549 n.15 (1987). Thus, in *Village of Gambell*, the Court explained that even if the United States did not hold title to submerged lands on the Outer Continental Shelf, those lands could be subject to regulation as "public lands" if the United States held an "interest[]" in those submerged lands. *Ibid.*

ANILCA's definition of "public lands" as encompassing "interests" in water is particularly important with respect to navigable waters because, as petitioner (Br. 36) and Alaska (Amicus Br. 24-25) acknowledge, it is *only* possible to own "interests" in navigable waters, rather than the navigable waters themselves. As this Court has held, "[n]either sovereign nor subject can acquire anything more than a mere usufructuary right" in navigable waters. *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954). That principle dates back to the "Institutes of Justinian," which explained that "running waters, like the air and the sea, were *res communes*—things common to all and property of none." *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 744 (1950); see also 2 William Blackstone, *Commentaries on the Laws of England* 395 (1766 ed.); Memorandum of Assistant Attorney General Olson, *Federal Non-Reserved Water Rights*, 6 Op. O.L.C. 328, 364-367 (1982); *Waters and Water Rights* § 36.02 (Amy K. Kelly, ed.) (3d ed. LexisNexis 2018). That principle is also reflected in the Submerged Lands Act, which provides that States generally hold "title to and ownership of the lands beneath navigable waters," and title to "the natural resources within such lands and waters," 43 U.S.C. 1311, not title to the navigable waters themselves.

The United States has interests in the navigable waters within and appurtenant to the federal lands inside the National Park System in Alaska. "[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose," under the doctrine of reserved water rights, "the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976). For example, where the United States holds title to reservation lands in trust for an Indian tribe, and the productivity of the reservation lands depends on irrigation, the United States' title also includes the right to waters appurtenant to the reservation sufficient to fulfill the tribe's needs to make agricultural use of their reservation lands. *Arizona* v. *California*, 373 U.S. 546, 600 (1963); see *Winters* v. *United States*, 207 U.S. 564, 576 (1908) (same). Reserved water rights exist not only when a reservation's purposes require withdrawal of water, but also when those purposes require that waters be protected against depletion or withdrawal by others. See, *e.g.*, *Cappaert*, 426 U.S. at 139.

Applying those principles, the United States holds interests in the navigable waters that are appurtenant to or within the federal lands set aside as portions of the National Park System in Alaska, because those waters must be safeguarded against depletion or diversion in order "to accomplish the purpose[s] of the reservation" of the adjoining land. *Cappaert*, 426 U.S. at 138. Congress has set aside land in the National Park System for the "fundamental purpose" of conserving the scenery, natural objects, and wildlife therein and facilitating enjoyment of those natural features. 54 U.S.C. 100101(a)

(Supp. IV 2016). And in creating and expanding units of the National Park System in Alaska specifically, Congress has again stated that its purposes include safeguarding waters, protecting aquatic wildlife, preserving opportunities for marine recreation, and preserving opportunities for subsistence use, including subsistence fishing. 16 U.S.C. 3101. Further, in each of the individual provisions of ANILCA that created or expanded units of the National Park System in Alaska, Congress stated its intent to protect particular bodies of water, particular fish or marine mammal populations and habitats, or a combination thereof. See 16 U.S.C. 410hh, 410hh-1. Because those purposes require that the waters within CSUs be safeguarded against depletion and diversion by others, Congress's reservations of park lands also reserved interests in appurtenant navigable waters.

This Court has repeatedly explained that statements of purpose like those at issue here reserve water rights for conservation purposes. *Cappaert*, 426 U.S. at 141 (reserved water right created by preservation of land at Devil's Hole Monument "for the reservation of the unusual features of scenic, scientific, and educational interest," because the proclamation stated that the pool was home to a particular species of fish and that the pool was of "outstanding scientific importance"); *United States* v. *New Mexico*, 438 U.S. 696, 709-710 (1978) (determining that particular language creating a national forest did not create a reserved water right in part based on the contrast between the statement of purpose for the forest and the language of the Organic Act noted above).

The Secretary has further concluded in regulations promulgated pursuant to notice-and-comment procedures that the United States' title to the lands reserved

in ANILCA includes reserved water rights in navigable waters within the National Park System. See 64 Fed. Reg. at 1279; 50 C.F.R. 100.3(b); see also 62 Fed. Reg. at 66,217-66,218 (proposed rule). As a result, as the Ninth Circuit correctly concluded in the *Katie John* cases, those reserved water rights constitute an "interest[]" in the navigable waters within the National Park System, and therefore establish that those waters are not removed from the sphere of permissible regulation by ANILCA Section 103(c).

Petitioner does not dispute that the United States holds an interest in the navigable waters appurtenant to or within federal lands in the National Park System in Alaska under the reserved-water-rights doctrine. Instead, he argues (Br. 35-36) that those rights are not "a title interest," but rather "a limited reservation of sovereign power." That is incorrect. Rights to withdraw or maintain flows of water are "property rights," *Niagara Mohawk*, 347 U.S. at 251, and their owners hold "title" to them. 3 Herbert T. Tiffany, *The Law of Real Property* § 722, at 117 (3d ed. 1939) (discussing "usufructuary title" to waters); see *Crum* v. *Mt. Shasta Power Corp.*, 30 P.2d 30, 36 (Cal. 1934) (en banc) (per curiam) (discussing riparian owners' "usufructuary title to the water"); *Radcliff's Ex'rs* v. *The Mayor*, 4 N.Y. 195, 196 (1850) (stating that an action is available against a person who diverts water "without having title to any thing more than the usufruct"). The federal government, moreover, holds that property right as an incident of its title to land. That is, the reserved water rights doctrine is based on the principle that when Congress exercises its right to reserve *property* interests to the government, its reservation of land carries with it the property interest in water needed to achieve the

purposes for which the federal government reserved lands in federal ownership. *Cappaert*, 426 U.S. at 139.

Petitioner alternatively contends (Br. 37-41) that regulation of activities on or relating to navigable waters within the National Parks "exceeds the scope of whatever reserved right the United States might hold," Br. 37. He observes that a reserved water right permits the United States to "exclude others from appropriating water that feeds federal land or to ensure that the federal government has access to a sufficient volume of water to meet its statutory objectives," Br. 38, but does not "confer[] on the federal government plenary regulatory power over the body of water at issue," Br. 39. This argument misunderstands the relevance of reserved water rights under ANILCA. The government does not argue that reserved water rights themselves carry sovereign powers. Rather, the Park Service's regulatory authority derives from the Organic Act, as amended by provisions including the 1976 Act. Reserved water rights are relevant, however, because petitioner has argued that Section 103(c) strips the Park Service of all authority to regulate lands that are not "public lands," and "public lands" are defined under ANILCA as not only lands and waters but also "interests" therein. The federal usufructuary title in navigable waters—the only type of title that it is *possible* to hold in navigable waters—demonstrates that such waters may be regulated as "public lands" under Section 103(c).

2. Congress has ratified the Secretary's construction of "public lands"

If ambiguity existed at the time of ANILCA's passage regarding whether navigable waters may be sub-

ject to rules for "public lands," that ambiguity was removed when Congress ratified regulations addressing that question. The Secretary addressed the application to navigable waters of ANILCA provisions concerning "public lands" more than two decades ago through regulations to implement ANILCA's subsistence-use priority. The Secretary ultimately determined that the federal interest in the navigable waters in the National Park System in Alaska permitted application on those waters of ANILCA's subsistence-use priority for "public lands." See *Alaska* v. *Babbitt*, 72 F.3d 698, 702 (9th Cir. 1995) (*Katie John I*) (explaining and adopting Secretary's conclusion that "public lands" under ANLICA include waters in which the United States has "reserved water rights"), cert. denied, 516 U.S. 1036 and 517 U.S. 1187 (1996); 64 Fed. Reg. at 1276 (identifying navigable waters within the National Park System in Alaska as "Federal land units in which reserved water rights exist," and consequently as "public lands").

Congress ultimately ratified those regulations. Appropriations measures initially delayed the full implementation of the Secretary's definition of "public lands" to reach navigable waters. Under the moratoria, the Secretary was permitted to enforce subsistence-use rules only in limited areas, rather than in all the areas identified as "public lands" through the regulations.[5] Those delays gave Alaska an opportunity to obviate the

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[5] See Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. I, § 101(c) [tit. III, § 336], 110 Stat. 1321-210; Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, Tit. III, § 316(a), 111 Stat. 1592; Department of the Interior and Related Agencies Appropriation Act, 1999, Pub. L. No. 105-277, Div. A, § 101(e) [tit. III, § 339(a)], 112 Stat. 2681-295.

need for the federal subsistence-use regulations entirely, by enacting an ANILCA-compliant subsistence-use priority. See 16 U.S.C. 3115(d) (providing that the Secretary shall not implement the subsistence-use priority if the State chooses to implement the priority itself). In 1999, however, Congress directed that if Alaska did not enact a measure to implement ANILCA's subsistence-use priority "before October 1, 1999," those geographic limits would be repealed, allowing the rules specifying the geographic scope of the subsistence-use priority for public lands to become operative. Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(e) [tit. III, § 339(b)], 112 Stat. 2681-296. When Alaska did not enact a rural subsistence-use priority by the date specified, the regulations applying the priority to specified navigable waters took effect.

Congress's actions present an unusually clear case of ratification. When Congress simply reenacts statutory language without change, against the backdrop of an authoritative construction by the responsible agency, Congress can be understood to have ratified the agency's interpretation. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012). Here, however, "Congress has not just kept its silence by refusing to overturn [an] administrative construction," but has instead "ratified [the administrative construction] with positive legislation," *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986), by providing for regulations defining "public lands" to take effect if the State failed to enact a subsistence-use priority within a specified period. This Court has explained that when Congress ratifies an administrative construction with positive legislation, courts "cannot but

deem [the administrative] construction virtually conclusive." *Ibid.*

C. Surrounding Provisions Of ANILCA Confirm That Section 103(c) Did Not Strip The Park Service Of Authority To Regulate Activities On Navigable Waters Within The National Park System

In considering Section 103(c) two years ago, this Court emphasized the importance of construing the provision in light of the "context of the statute as a whole." 136 S. Ct. at 1070. It explained that "[s]tatutory language 'cannot be construed in a vacuum,'" and that the words of Section 103(c) must "'be read in their context and with a view to their place in the overall statutory scheme.'" *Ibid.* (quoting *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012)). Here, statutory context removes any doubt that Congress understood and intended that the Park Service could adopt rules to protect navigable waters and regulate conduct on or relating to those waters within the National Park System in Alaska.

1. Surrounding provisions demonstrate that the Park Service retains authority to regulate navigable waters within the National Park System

Numerous provisions of ANILCA demonstrate that the Park Service retains authority to regulate conduct on navigable waters within the boundaries of the National Park System. First, as noted above, Congress stated clearly (and repeatedly) in ANILCA that its purposes in placing new areas under the Park Service's regulatory authority included "to protect and preserve * * * rivers," 16 U.S.C. 3101(b), to protect the "waters" in the new and expanded units, 16 U.S.C. 3101(a), and to preserve opportunities for canoeing and fishing on

"freeflowing rivers," 16 U.S.C. 3101(b). It did the same in the statements of purpose regarding particular units, including in designations that state an intent to protect navigable waters such as the "Aniakchak River," 16 U.S.C. 410hh(1), the Kobuk and Salmon Rivers, 16 U.S.C. 410hh(6), and "the Noatak River," 16 U.S.C. 410hh(8), and stretches of "the Alsek River," 16 U.S.C. 410hh-1(1). Indeed, Congress directed that the Secretary manage the Yukon-Charley *Rivers* National Preserve, in which petitioner was operating his hovercraft, "[t]o maintain the environmental integrity of the *entire Charley River basin, including streams, lakes*, and other natural features, *in its undeveloped natural condition for public benefit* and scientific study, *to protect habitat for*, and populations of, *fish* and wildlife." 16 U.S.C. 410hh(10) (emphasis added). Those provisions demonstrate that Congress regarded rivers and other waters as central parts of System units. And they confirm that the Park Service is permitted under ANILCA to issue rules to protect and preserve the waters, including navigable waters, within the National Park System.

Second, ANILCA's provisions relating to subsistence use demonstrate that Congress regarded navigable waters within the National Park System as subject to regulation as public lands. Congress stated that it sought through ANILCA to "provide the opportunity for rural residents engaged in a subsistence way of life," 16 U.S.C. 3101(c), including "customary and traditional" fishing activities, 16 U.S.C. 3113, "to continue to do so," 16 U.S.C. 3101(c). It described "the continuation of the opportunity for subsistence uses by rural residence of Alaska * * * on the public lands" as "essential" to both Native and non-Native Alaskans. 16 U.S.C.

3111(1). And it stated that there was no practical alternative "to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses." 16 U.S.C. 3111(2). Congress therefore authorized subsistence hunting and fishing activities within many units of the National Park System and provided a priority for subsistence fishing over non-subsistence fishing on all "public lands." 16 U.S.C. 3114. Those provisions demonstrate that the "public lands" to which the subsistence-use priority applies include navigable waters, because the "customary and traditional" fishing activities that Congress specified the priority would protect, 16 U.S.C. 3113, are conducted "in navigable waters," rather than non-navigable ones. *Katie John I*, 72 F.3d at 702. Congress could not have "[p]rovide[d] the opportunity for rural residents engaged in a subsistence way of life to continue to do so," 16 U.S.C. 3101(c), without protecting the "customary and traditional" fishing activities, 16 U.S.C. 3113, that are part of a "subsistence way of life," 16 U.S.C. 3101(c).

Third, Congress again made clear that ANILCA preserves the Secretary's authority to regulate conduct on navigable waters in provisions designating particular rivers to be part of the National Park System. Title VI of ANILCA decrees that 26 rivers are "to be administered by the Secretary of the Interior" as "wild and scenic rivers within the national park system" or "wild and scenic rivers within national wildlife refuge system," §§ 601-603, 94 Stat. 2412-2413 (capitalization omitted). Under the Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*, a river that Congress designates to be "administered by the Secretary of the Interior through the National Park Service" is made "part of the national park system," and

is to be administered pursuant to the "general statutory authorities relating to areas of the national park system," 16 U.S.C. 1281(c), for the purpose of "protect[ing] and enhanc[ing] the values which caused [the river] to be" designated, 16 U.S.C. 1281(a). Such designations thus reflect Congress's intent that the Park Service could in fact administer the rivers pursuant to its general statutory authorities. Those designations cannot be reconciled with a reading of ANILCA Section 103(c) that would immunize navigable waters from federal regulation by placing them outside of the relevant CSU. See 16 U.S.C. 3102(4) (defining "conservation system unit" to include "any unit in Alaska of the National Park System" or "National Wild and Scenic Rivers Systems").

Fourth, ANILCA again establishes that it did not rescind the Park Service's authority to regulate activities on navigable waters within the National Park System in Alaska through provisions that either confirm or constrain Park Service authority to regulate individuals' passage along particular navigable waters, motorboating, and fishing. For example, ANILCA provides that:

- Motorboats may be used in conservation systems units "subject to reasonable regulations by the Secretary to protect the natural and other values of the conservation system units," 16 U.S.C. 3170; see 16 U.S.C. 3121 (permitting motorboats "on the public lands");
- The Secretary may issue "regulations prescribing * * * restrictions relating to * * * fishing," 16 U.S.C. 3201; see also 16 U.S.C. 3204;
- "[P]ermanent improvements and facilities such as fishways, fish weirs, fish ladders, fish hatcheries,

spawning channels, stream clearance, egg planting, and other accepted means of maintaining, enhancing, and rehabilitating fish stocks may be permitted" in wildlife refuges, but only "[s]ubject to reasonable regulations," 16 U.S.C. 3203(b);

- "The Secretary may take no action to restrict unreasonably the exercise of valid commercial fishing rights or privileges obtained pursuant to existing law," ANILCA § 205, 94 Stat. 2384; and
- "[S]ubject to reasonable regulation, the Secretary shall administer the [Yukon Delta Wildlife] refuge so as to not impede the passage of navigation and access by boat on the Yukon and Kuskokwim Rivers," ANILCA § 303, 94 Stat. 2393.

These provisions again confirm that Section 103(c) does not divest the Park Service of authority to regulate conduct on navigable waters within the boundaries of the National Park System. Congress would not have barred the Secretary from impeding "passage of navigation and access by boat on the Yukon and Kuskowim Rivers" within the Yukon Delta Wildlife Refuge if the Secretary lacked authority to regulate conduct on navigable waters—because the Yukon and Koskowim Rivers within the Yukon Delta Wildlife Preserve are navigable. See, *e.g.*, *United States* v. *Wilde*, No. 10-cr-21, 2013 WL 6237704 (D. Alaska Dec. 3, 2013) (noting that Yukon River is navigable); Bureau of Land Management, *Final Summary Report: Federal Interest in Lands Underlying Kuskokwim River in the Kuskokwim Bay Subregion, Alaska.*[6] And statutory safeguards for motorboating and "valid commercial fishing

[6] https://www.blm.gov/sites/blm.gov/files/LandsRealty_Alaksa_RDI_KuskokwimRiver_FinalReport_05012013.pdf.

rights" likewise reflect an understanding that the Park Service would have regulatory authority over activities on navigable waters within the National Park System, because motorboating and commercial fishing are not activities that occur with any frequency on waters that are not navigable.

Petitioner's view of Section 103(c) as withdrawing Park Service authority over activities on navigable waters is equally undermined by the provision concerning ANILCA's "[e]ffect on existing rights; water resources," 16 U.S.C. 3207, that petitioner himself invokes (Br. 33). Section 3207 specifies that "[n]othing in [ANILCA] shall be construed as limiting or restricting the power and authority of the United States," and then provides —in a manner incompatible with petitioner's position— that "[n]othing in this Act shall be construed * * * as affecting in any way any law governing * * * use of * * * water on lands within the State of Alaska." Petitioner contradicts those instructions by construing Section 103(c) to affect—indeed, to withdraw entirely—the Secretary's preexisting authorities under the Organic Act, as amended by the 1976 Act, to regulate uses of water within the National Park System in Alaska, including in National Parks that predated ANILCA.

Petitioner disregards that portion of Section 3207, but invokes (Br. 33) the portion stating that nothing in ANILCA should be understood "as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control." 16 U.S.C. 3207(2). That provision does not bear on the Secretary's authority here, because rules concerning such matters as sanitation, pollution, and transportation on waters in the National Park System

do not deprive the State or federal government of "jurisdiction, responsibility, interests, or rights" in the "resources" contained within water. See *ibid.* (referring to "water resources" that can be "develop[ed]"); see also 16 U.S.C. 3207(3) (discussing "Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto"). Petitioner's invocation of Section 3207(2) appears to rest on a misreading of the provision (Br. 33) as discussing "water resources, development, or control" rather than "water resources development or control." 16 U.S.C. 3207(2). In any event, if regulation of boating and other activities *were* a matter of "water resources development or control," *ibid.*, interpreting Section 103(c) to rescind the Park Service's authority over those activities would "diminish[] Federal * * * jurisdiction, responsibility, interests, or rights" in those matters. *Ibid.*

More generally, petitioner's approach to Park Service authority is implausible. Petitioner appears to believe that Congress intended Section 103(c) to create a patchwork of jurisdiction, in which the Park Service would be free to regulate pursuant to its longstanding authorities on non-navigable stretches, but would be divested of its authorities where the waters become navigable—and perhaps only for limited stretches, if the waters then became non-navigable again. That approach, however, would often make the duties of Park Service rangers impossible. Determining navigability requires analysis of whether particular stretches of water could be used for trade and travel at the time of statehood. See *PPL Montana*, 565 U.S. at 600. For many waters, those determinations are difficult, and in Alaska, the remoteness of rivers and the fact that many

rivers debouch from glaciers and flow shallowly across the landscape for some distance can make navigability determinations even more piecemeal and complex. Thus, navigability determinations depend in many instances on information that "is both time consuming and expensive" to obtain, particularly in light of "Alaska's undeveloped and remote character"; require application of a navigability test that has been the subject of substantial disagreement when applied "to the specific uses of Alaska's lakes and streams"; and yield an answer that is "always subject to legal challenge." Alaska Dep't of Natural Res., Mining, Land & Water, *State Policy on Navigability*, http://dnr.alaska.gov/mlw/nav/policy. It is improbable that Congress intended to make the ability of Park Service rangers to enforce rules within the National Park System turn on such costly and uncertain determinations.

2. Neither petitioner nor Alaska persuasively accounts for these provisions

Neither petitioner nor amicus Alaska persuasively reconciles their interpretations of Section 103(c) with these numerous surrounding statutory provisions. Petitioner acknowledges (Br. 34 & n.4) that the application on navigable waters of the subsistence-use priority limited to public lands has a "foothold in the statute" (citation omitted). But he fails to explain how "public lands" could have a different meaning in the subsistence-use provision than it does elsewhere in ANILCA.[7]

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[7] Petitioner briefly suggests (Br. 34) that the subsistence-use provisions aid his argument because ANILCA specifies that "[n]othing in [ANILCA] is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands" except as is provided in the subsistence-use provisions. 16 U.S.C. 3202(a). But in declining to rescind the

Beyond this, petitioner addresses the subsistence-use priority, the statutory statements of purpose, and the other provisions premised on Park Service authority over navigable waters only by invoking (Br. 29) the principle that "Congress did not intend to pursue conservation at all costs." That observation does not aid petitioner. ANILCA does demonstrate a commitment to balancing conservation goals against other aims, including through Alaska-specific safeguards for private and commercial activity that the Park Service might otherwise have prohibited for conservation reasons. See 136 S. Ct. at 1071 (discussing protections for motorboating, commercial fishing, and other examples); pp. 43-45, *supra*. But ANILCA's statements of purpose, subsistence-use priority, and limited protections for activities such as commercial fishing and motorboating all demonstrate that Congress struck a balance between conservation and other goals under which the Park Service generally retained authority to regulate conduct on navigable waters.

Alaska does not address most of the water-related provisions discussed above, but it acknowledges (Br. 29-35) that the subsistence-use priority on "public lands" within CSUs must be applied on navigable waters in light of the provisions explaining the priority's intended operation. Br. 31-32. It agrees that "this Court should preserve the *Katie John* precedents" holding as much. Br. 31. Alaska nevertheless posits that this Court could interpret ANILCA as rescinding within

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Park Service's preexisting authority to regulate boating and other activities on or relating to navigable waters within National Parks in Alaska, ANILCA did not "diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on public lands." *Ibid.*

Alaska the Park Service's authority to regulate conduct on navigable waters within the National Park System by giving "public lands" one meaning in the context of the subsistence-use-related sections of ANILCA and a different meaning in the context of Section 103(c).

ANILCA, however, forecloses that course: the statute contains a definitional section that sets out the meaning of "public lands" throughout ANILCA. 16 U.S.C. 3102(1)-(3) (defining "public lands," in relevant part, as "lands, waters, and interests therein," "the title to which is in the United States"). Accordingly, this Court held in *Village of Gambell* that "the same definition of 'public lands' which defines the scope of Title VIII"—ANILCA's subsistence-use provisions—"applies as well to the rest of the statute," except where the definitional provision itself provides to the contrary. 480 U.S. at 550-551. That holding reflects the principle that "[w]hen a statute includes an explicit definition, [the Court] must follow that definition." *Digital Realty Trust, Inc.* v. *Somers*, 138 S. Ct. 767, 776-777 (2018) (citation omitted). And it reflects that a statute "[l]eav[es] no doubt as to [a] definition's reach" when it contains a directive concerning the provisions as to which a definition applies, as ANILCA does. *Id.* at 777; see 16 U.S.C. 3102 (specifying that definitions of specified terms, including "[t]he term 'public lands,'" apply "[a]s used in this Act (except that in titles IX and XIV, the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act and the Alaska Statehood Act)") (citation omitted).

Alaska invokes (Br. 33-34) *Utilities Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427 (2014), which found a statutory definition did not govern certain provisions

when it was "plain as day" that the term carried a narrower meaning in those provisions and that application of the statutory definition would be "incompatible" with the statute's "regulatory structure." *Id.* at 2240, 2242. But *Village of Gambell* rejected that approach to ANILCA's definition of "public lands" for good reason: the circumstances in which "a defined meaning can be replaced with another permissible meaning of [a] word on the basis of other textual indications" are "very rare"; "the definition is virtually conclusive." Scalia & Garner 228. Here, there are no compelling indicators that "public lands" is used differently in different provisions of ANILCA. On the contrary, as discussed above, multiple provisions of ANILCA—not just the subsistence-use provision—indicate that the government's interest in navigable waters was understood to permit regulation of those waters as "public lands."

D. The Placement And History Of Section 103(c) Confirm That The Provision Does Not Rescind Park Service Authorities Over Navigable Waters

1. The placement of Section 103(c) provides additional evidence that it is not to be read as the sweeping withdrawal of the Park Service's authority that petitioner claims. Rather than placing Section 103(c) in one of the ANILCA provisions setting forth or limiting the Secretary's substantive authority, Congress placed it in a section entitled "Maps." 16 U.S.C. 3103. That section is principally focused on the availability of physical maps. Its provisions require the Secretary to place maps "on file and available for public inspection," 16 U.S.C. 3103(a), to arrange for maps and descriptions to be placed on file with Congress and published in the Federal Register, and to address "minor" adjustments of boundary lines, 16 U.S.C. 3103(b). Congress does not "hide elephants

in mouseholes." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Accordingly, Congress's placement of Section 103(c) as a third subsection in the Maps' section of ANILCA reinforces that Section 103(c) should not be read as an implicit revocation of the Park Service's longstanding authority to regulate activities on navigable waters within the boundaries of the National Park System.

2. The manner in which Congress added Section 103(c) to ANILCA reinforces that conclusion. When ANILCA was initially passed by the Senate and House of Representatives, it left the Park Service's authority over navigable waters in place, expressly directing the Secretary to "administer the lands, waters, and interests" within new CSUs "as new areas of the National Park System" under the provisions of the Organic Act which includes the 1976 Act. See 16 U.S.C. 410hh-2. Congress then added Section 103(c) to ANILCA as part of a concurrent resolution, the text of which explained that it contained only "corrections." H.R. Con. Res. 452, 96th Cong., 2d Sess. (1980) (94 Stat. 3688). A "correction[]" would not be an apt description of a significant withdrawal of Park Service authorities. And it is improbable that a Congress seeking to protect waters, rivers, and fish in new and expanded National Parks would have voted to rescind Park Service authority to regulate activities on navigable waters by a unanimous vote of both Houses.

3. The legislative record supplies still further evidence that Section 103(c) was not designed to make any broad change in the Park Service's authority over navigable waters. In offering the concurrent resolution that added Section 103(c) to ANILCA, the sponsor in the House of Representatives emphasized that no portion

of the resolution would "change any of the major features of the Alaska National Interest Lands Conservation Act" or "have the effect of altering provisions related to conservation areas." 126 Cong. Rec. at 30,498 (statement of Rep. Udall). And in both the House and the Senate, Section 103(c) was labeled a "minor revision[]" —a label plainly inapplicable to an amendment that would rescind or revise longstanding authority to regulate navigable waters throughout National Parks System Units in the State of Alaska. *Ibid.*; see 126 Cong. Rec. 31,108 (1980); see also 125 Cong. Rec. 11,156 (1979) (statement of Rep. Seiberling) (describing amendment to add text of Section 103(c) to bill as "technical," "noncontroversial," and not a "substantive amendment[]").

Petitioner plumbs the legislative record (Br. 7-10) for statements in which Members of Congress noted ANILCA's distinction between "public lands" and "State, native, or private land." But petitioner identifies no occasion at any point when any Member of Congress suggested that rivers, lakes, and other navigable waters that ANILCA sought to protect through the creation and expansion of CSUs would be excluded from Park Service regulation. To the contrary, Members repeatedly indicated that they understood that ANILCA would enable federal park managers to safeguard the rivers placed within park units, as the statute itself makes clear. See, *e.g.*, H.R. Rep. No. 97, 96th Cong., 1st Sess. Pt. 1, at 457 (1979); 125 Cong. Rec. 14,673 (1978) (Rep. Kostmayer); 125 Cong. Rec. 11,178 (1979) (Rep. Bereuter).

E. Petitioner Errs In Urging A Clear-Statement Rule As A Basis For Rescinding The Park Service's Authorities Over Navigable Waters

Petitioner urges (Br. 31-32) that the Court should reject application of Park Service rules to navigable waters in Alaska based on a clear-statement rule. He invokes the principle that a clear statement is required when a statute "alter[s] the 'usual constitutional balance between the States and the Federal Government.'" Br. 32 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991)).

That argument lacks merit. In the first place, the 1976 Act and ANILCA make abundantly clear in numerous provisions that the Park Service's authority applies to navigable waters in the National Park System. Under the 1976 Act, there is no dispute that the Park Service may generally regulate such matters as sanitation, pollution, and watercraft use on navigable waters within the National Park System. In arguing that ANILCA Section 103(c) withdrew the authority that the 1976 Act supplies, within the State of Alaska, it is petitioner who seeks to alter a federal-state balance Congress has clearly established. Moreover, for the reasons described above, ANILCA itself also makes clear that the Park Service retains its 1976 Act authorities over navigable waters within the National Park System.

In any event, there is no basis for a clear-statement rule in the context of federal regulation of navigable waters. Since the Founding Era, the "usual constitutional balance" concerning navigable waters has been one of joint federal and state control, Pet. Br. 32 (citation omitted). As a general matter, each State holds "title within its borders to the beds of waters [that were] navigable"

at the time of statehood, but its authority to govern activities on navigable waters is "subject * * * to 'the paramount power of the United States to control such waters'" under the dominant federal navigational servitude. *PPL Montana*, 565 U.S. at 591 (citation omitted); see *United States* v. *Rands*, 389 U.S. 121, 127 (1967) (argument that federal regulation of activity on navigable waters "subverts the policy of the Submerged Lands Act" is "misplaced," because that act "expressly recognized that the United States retained 'all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership'") (citation omitted); see also *Alaska* v. *United States*, 545 U.S. 75, 116-117 (2005) (Scalia, J., concurring in part and dissenting in part) ("If title to submerged lands passed to Alaska, the Federal Government would still retain significant authority to regulate activities in the waters of Glacier Bay by virtue of its dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power."). This "paramount" power applies to regulation of navigable waters "irrespective of whether navigation" itself "is involved." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 173-174 (1979).

Petitioner points to no case in which this Court has required a "clear statement" to uphold a federal statute exercising this traditional power to regulate conduct on navigable waters. Petitioner invokes (Br. 32) *Solid Waste Agency* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), and *Rapanos* v.

United States, 547 U.S. 715 (2006). But those cases applied a clear-statement rule in determining how far the Clean Water Act extends *beyond* traditional navigable waters. While the Clean Water Act states that it applies on "navigable waters," "the meaning of 'navigable waters' in the [Clean Water] Act is broader than the traditional understanding of the term." *Rapanos*, 547 U.S. at 731 (plurality opinion) (citation omitted); see, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). *SWANCC* and *Rapanos* addressed how far beyond traditional navigable waters the statute extended, with each case rejecting extensions to particular non-navigable waters. *SWANCC*, 531 U.S. at 162, 171 (addressing "nonnavigable" intrastate waters used as migratory bird habitats); *Rapanos*, 547 U.S. at 735 (plurality opinion) (agreeing that Clean Water Act jurisdiction extends beyond traditional navigable waters, but stating that the Court need not decide how far because "typically dry channels" receiving intermittent flows of water are not covered). And a clear-statement rule would be especially inappropriate in the context of waters within the National Park System—where the federal government has interests as a property-holder in addition to as a sovereign.

F. The Secretary's Interpretation Would Warrant *Chevron* Deference If There Were Ambiguity In The Statutory Scheme

The text and structure of the 1976 Act and of Section 103(c) clearly establish that Section 103(c) does not rescind the Park Service's authority to regulate conduct on navigable waters within CSUs. But if ambiguity existed, the Secretary's formal rulemaking would settle the matter. The Secretary is entitled to deference concerning reasonable interpretations of ANILCA and the

1976 Act. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

Here, the Secretary has issued regulations through notice-and-comment procedures that make Park Service rules applicable on navigable waters within the boundaries of the National Park System, including within Alaska. 36 C.F.R. 1.2(a)(3); see 61 Fed. Reg. at 35,136. In doing so, the Secretary considered and rejected the argument that Section 103(c) "should be interpreted as superseding NPS authority" under the 1976 Act to "promulgate and enforce regulations concerning boating and related activities * * * on navigable waters within park boundaries." 61 Fed. Reg. at 35,135. The Secretary determined that Section 103(c) did not "preempt[] NPS's well-established authority on navigable waters," emphasizing that ANILCA "charged NPS to protect populations of fish and wildlife and habitat that necessarily includes the great river systems running through and within the parks (ANILCA Title II)." *Ibid.* The Secretary rejected petitioner's interpretation of Section 103(c), "which was characterized by Congress as a minor or technical provision," after reading Section 103(c) in "the context of the whole act." *Ibid.*

The Secretary has also rejected petitioner's arguments regarding Section 103(c) in other notice-and-comment regulations. First, the Secretary has determined that Section 103(c) does not bar application on non-public lands of the narrow class of regulations validly written to apply to both public and non-public lands within the National Park System. 59 Fed. Reg. at 65,950. The Secretary has explained that such regulations are not rules that apply "solely to public lands within" the parks. *Ibid.* (quoting 16 U.S.C. 3103(c)). Moreover the Secretary explained, while non-public

lands are not "'a portion of' the [conservation system] unit," such lands are still "'within' [the] unit." 59 Fed. Reg. at 65,950. See pp. 26-29, *supra* (explaining that Section 103(c) is not relevant to 1976 Act authority for this reason). In addition, as noted above, in implementing ANILCA's subsistence-use priority, the Secretary adopted regulations, subsequently ratified by Congress, reflecting the reasonable conclusion that "public lands" include navigable waters within the National Park System in Alaska, by virtue of federal reserved water rights. 64 Fed. Reg. at 1276; see pp. 32-37, *supra* (explaining that the federal interest in navigable waters supports regulation of those waters as "public lands" for this reason). At minimum, these conclusions are reasonable and entitled to deference.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 16 U.S.C. 3101 provides:

Congressional statement of purpose

(a) Establishment of units

In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, the units described in the following titles are hereby established.

(b) Preservation and protection of scenic, geological, etc., values

It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing, fishing, and sport hunting, within large arctic and subarctic wildlands and on free-

flowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems.

(c) Subsistence way of life for rural residents

It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

(d) Need for future legislation obviated

This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

2. 16 U.S.C. 3102 provides in pertinent part:

Definitions

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.], and the Alaska Statehood Act)—

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.

(3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except—

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act [43 U.S.C. 1618(b)].

(4) The term "conservation system unit" means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter.

* * * * *

3. 16 U.S.C. 3103 provides:

Maps

(a) Filing and availability for inspection; discrepancies; coastal areas

The boundary maps described in this Act shall be on file and available for public inspection in the office of the Secretary or the Secretary of Agriculture with regard to the National Forest System. In the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling, but the boundaries of areas added to the National Park, Wildlife Refuge and National Forest Systems shall, in coastal areas not extend seaward be-

yond the mean high tide line to include lands owned by the State of Alaska unless the State shall have concurred in such boundary extension and such extension is accomplished under the notice and reporting requirements of this Act.

(b) Changes in land management status; publication in Federal Register; filing; clerical errors; boundary features and adjustments

As soon as practicable after December 2, 1980, a map and legal description of each change in land management status effected by this Act, including the National Wilderness Preservation System, shall be published in the Federal Register and filed with the Speaker of the House of Representatives and the President of the Senate, and each such description shall have the same force and effect as if included in this Act: *Provided, however*, That correction of clerical and typographical errors in each such legal description and map may be made. Each such map and legal description shall be on file and available for public inspection in the office of the Secretary. Whenever possible boundaries shall follow hydrographic divides or embrace other topographic or natural features. Following reasonable notice in writing to the Congress of his intention to do so the Secretary and the Secretary of Agriculture may make minor adjustments in the boundaries of the areas added to or established by this Act as units of National Park, Wildlife Refuge, Wild and Scenic Rivers, National Wilderness Preservation, and National Forest Systems and as national conservation areas and national

recreation areas. For the purposes of this subsection, a minor boundary adjustment shall not increase or decrease the amount of land within any such area by more than 23,000 acres.

(c) Lands included within unit; acquisition of land by Secretary

Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

4. 16 U.S.C. 3191(b) provides in pertinent part:

Management plans

(b) National Park service plan requirements

Each plan for a unit established, redesignated, or expanded by subchapter LIX-F of chapter 1 of this title shall identify management practices which will carry out the policies of this Act and will accomplish the purposes for which the concerned National Park System

unit was established or expanded and shall include at least the following:

* * * * *

(7) A description (A) of privately owned areas, if any, which are within such unit, (B) of activities carried out in, or proposed for, such areas, (C) of the present and potential effects of such activities on such unit, (D) of the purposes for which such areas are used, and (E) of methods (such as cooperative agreements and issuance or enforcement of regulations) of controlling the use of such activities to carry out the policies of this Act and the purposes for which such unit is established or expanded.

* * * * *

5. 54 U.S.C. 100101 (Supp. IV 2016) provides in pertinent part:

Promotion and regulation

(a) IN GENERAL.—The Secretary, acting through the Director of the National Park Service, shall promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will

leave them unimpaired for the enjoyment of future generations.

* * * * *

6. 54 U.S.C. 100751 (Supp. IV 2016) provides in pertinent part:

Regulations

(a) IN GENERAL.—The Secretary shall prescribe such regulations as the Secretary considers necessary or proper for the use and management of System units.

(b) BOATING AND OTHER ACTIVITIES ON OR RELATING TO WATER.—The Secretary, under such terms and conditions as the Secretary considers advisable, may prescribe regulations under subsection (a) concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States. Any regulation under this subsection shall be complementary to, and not in derogation of, the authority of the Coast Guard to regulate the use of water subject to the jurisdiction of the United States;

* * * * *

7. 16 U.S.C. 410hh provides in pertinent part:

Establishment of new areas

The following areas are hereby established as units of the National Park System and shall be administered by the Secretary under the laws governing the administration of such lands and under the provisions of this Act:

* * * * *

(10) Yukon-Charley Rivers National Preserve, containing approximately one million seven hundred and thirteen thousand acres of public lands, as generally depicted on map numbered YUCH–90,008, and dated October 1978. The preserve shall be managed for the following purposes, among others: To maintain the environmental integrity of the entire Charley River basin, including streams, lakes and other natural features, in its undeveloped natural condition for public benefit and scientific study; to protect habitat for, and populations of, fish and wildlife, including but not limited to the peregrine falcons and other raptorial birds, caribou, moose, Dall sheep, grizzly bears, and wolves; and in a manner consistent with the foregoing, to protect and interpret historical sites and events associated with the gold rush on the Yukon River and the geological and paleontological history and cultural prehistory of the area. Except at such times when and locations where to do so would be inconsistent with the purposes of the preserve, the Secretary shall permit

aircraft to continue to land at sites in the Upper Charley River watershed.

8. 36 C.F.R. 1.2 provides in pertinent part:

Applicability and scope

(a) The regulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within:

(1) The boundaries of federally owned lands and waters administered by the National Park Service;

(2) The boundaries of lands and waters administered by the National Park Service for public-use purposes pursuant to the terms of a written instrument;

(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or lowlands;

(4) Lands and waters in the environs of the District of Columbia, policed with the approval or concurrence of the head of the agency having jurisdiction or control over such reservations, pursuant to the provisions of the Act of March 17, 1948 (62 Stat. 81);

(5) Other lands and waters over which the United States holds a less-than-fee interest, to the extent necessary to fulfill the purpose of the National Park Service administered interest and compatible with the nonfederal interest.

(b) The regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on nonfederally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.

(c) The regulations contained in part 7 and part 13 of this chapter are special regulations prescribed for specific park areas. Those regulations may amend, modify, relax or make more stringent the regulations contained in parts 1 through 5 and part 12 of this chapter.

* * * * *

9. 36 C.F.R. 2.17 provides in pertinent part:

Aircraft and air delivery.

* * * * *

(e) The operation or use of hovercraft is prohibited.

* * * * *

No. 17-949

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

The Alaska National Interest Lands Conservation Act ("ANILCA") unambiguously provides that only lands and waters to which the United States holds "title" are deemed "public lands" subject to the regulatory jurisdiction of the National Park Service ("NPS"). 16 U.S.C. §§ 3102, 3103(c). The federal government—as it concedes—does not hold title to the navigable waterways at issue here. That should be dispositive. And if there were doubt, ANILCA's history, structure, and purpose—as well as the clear statement rule—all confirm that Congress limited NPS management authority in Alaska to only the statutorily-designated "public lands."

NPS offers a limited (and unpersuasive) defense of the Ninth Circuit's decision. Instead, NPS tries to change the subject, arguing that the key statute here is not ANILCA but rather its general management statute, the National Park Service Organic Act ("Organic Act"). In NPS's view, the Organic Act grants it plenary regulatory authority over all waters "within" ANILCA conservation system units ("CSUs"), regardless of title or ownership. But that is untenable. ANILCA *both* created the national parks at issue *and* imposed critical Alaska-specific restrictions on NPS management of such lands and waters. That is the bargain Section 103(c) embodies: it "draws a distinction between 'public' and 'non-public' lands within the boundaries of [CSUs] in Alaska." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1071 (2016). NPS would obliterate that distinction by seizing control of non-federal waters that Congress placed beyond its general Organic Act authority.

NPS may see Alaska's navigable waters as equivalent to any other located within a national park unit elsewhere. "To a hammer," after all, "everything looks like a nail." *American Exp. Co. v. Italian Colors Restaurant*, 570 U.S. 228, 252 (2013) (Kagan, J., dissenting). But NPS continues to ignore the "simple truth that Alaska is often the exception, not the rule." *Sturgeon*, 136 S. Ct. at 1071. Congress resolved a longstanding controversy in Alaska by expanding the National Park System in a way that ensured that non-federal territory newly encircled by these parks was not subject to NPS's general management authority. Congress's judgment—expressed in Section 103(c) of ANILCA—must be enforced.

ARGUMENT

I. NPS's Reliance on the Organic Act Is Misplaced.

NPS's lead argument (at 25-32) is that the key statute here is not ANILCA—which specifically addresses Alaska lands—but instead the Organic Act, which grants NPS management authority over certain waters "within" park boundaries. 54 U.S.C. § 100751(b). That argument rests on a fundamental misconception of the relationship between ANILCA and the Organic Act.

NPS asserts at least 15 times (at 2, 13, 16-17, 20-22, 24, 26, 30, 32, 37, 40, 44, 46) that Mr. Sturgeon is advancing an interpretation of ANILCA that would "strip" or "divest" NPS of its authority under Section 100751(b). Repeating it does not make it true. NPS ignores that it had *no* authority over these waters until ANILCA expanded the National Park System by more than 43 million acres in 1980. ANILCA both created these new national park units *and*

imposed Alaska-specific restrictions on NPS's authority. NPS's characterization of ANILCA as mostly irrelevant to its authority under the Organic Act thus falls flat.

Indeed, ANILCA repeatedly states that the new CSUs must be managed consistent with NPS's general authority *and* in accordance with ANILCA's terms and conditions. The first sentence of the section that established the ten new units of the National Park System (including Yukon-Charley) states that they "shall be administered by the Secretary under the laws governing the administration of such lands *and under the provisions of this Act.*" 16 U.S.C. § 410hh (emphasis added); *see also id.* § 410hh-2 (directing the Secretary to administer new additions to the National Park System pursuant to NPS's enabling acts and "the other applicable provisions of this Act"); *id.* § 3201 ("A National Preserve in Alaska shall be administered and managed as a unit of the National Park System in the same manner as a national park except as otherwise provided in this Act."). NPS's general park-management authority must be exercised subject to ANILCA's Alaska-specific restrictions.[1]

To the extent there is any tension between ANILCA and the Organic Act, then, ANILCA—as both the more recent and more specific enactment—takes precedence:

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1. ANILCA is not unusual in this regard. Statutes creating new units of the National Park System often contain additional park-specific restrictions. As NPS itself has recognized, "[t]he management and administration of park areas must be in accordance with both the general laws relating to the National Park System and the more specific laws relating to the authorization and administration of a particular park unit." 48 Fed. Reg. 30,252 (June 30, 1983).

"a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it [has] not been expressly amended." *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998). That is especially true where, as here, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). NPS's attempt to justify the hovercraft ban under its Organic Act wholly apart from ANILCA violates bedrock principles of statutory interpretation.

II. NPS Fundamentally Misconstrues the Text, Purpose, History, and Structure of ANILCA.

NPS's attempt to reconcile its position with ANILCA fares no better than its attempt to circumvent the statute. NPS tries to frame Section 103(c) as a minor, technical afterthought that has little substantive impact. But those arguments fail at every step.

A. NPS's Position Is Contrary to the Text of ANILCA.

Section 103(c) of ANILCA provides that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). "Public lands" are defined in relevant part as "Federal lands," which are in turn defined as "lands the title to which is in the United States." *Id.* §§ 3102(2)-(3). ANILCA further instructs that "[n]o lands which, before, on, or after [the date of enactment of this Act], are conveyed to the State, to any Native Corporation,

or to any private party shall be subject to the regulations applicable solely to public lands within such units." *Id.* § 3103(c). Finally, the statute provides that non-public lands may not be administered as part of the National Park System unless they are conveyed to the United States. *Id.* In short, Section 103(c) "draws a distinction between 'public' and 'non-public lands' within the boundaries of [CSUs]," *Sturgeon*, 136 S. Ct. at 1071, and makes triply clear that non-public lands remain outside the reach of federal park management authority even if they happen to fall within the boundaries of a CSU. *See* Pet. Br. 25-31.

NPS (at 24) does not dispute that Section 103(c) limits its park management authority over non-federal *lands* within CSUs. Yet it continues to argue that Section 103(c) has no application to non-federal *waters*. *See* Resp. Br. 24-29. NPS relies on its Organic Act authority to "prescribe regulations ... concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States." 54 U.S.C. § 100751(b). According to NPS, because the Nation River and other navigable waterways pass through the Alaska CSUs, they are "within" those units and therefore within the reach of § 100751(b). That is wrong for multiple reasons.

Foremost, NPS ignores that ANILCA defines "land" as meaning "lands, waters, and interests therein." 16 U.S.C. § 3102(1). Non-public "land" thus includes the "waters" that run through them. NPS may claim (at 31-32, 52) that it is asserting only a modest power because § 100751(b) limits it to promulgating "water-related rules." But that supposedly modest assertion of authority would impermissibly write "waters" out of ANILCA's definition of lands.

For the same reason, NPS is mistaken to assert (at 26-28) that it has authority to regulate any waters "within System units" even if those waters are not a "portion" of the unit under Section 103(c). By including "waters" in the definition of "land," 16 U.S.C. § 3102(1), Congress made clear that waters are subject to the same restrictions as dry land—*e.g.*, waters are deemed to be a part of the relevant CSU *only if they meet the definition of public lands*. If NPS were correct, there would have been no reason for Congress to address the disposition of "waters" in Section 103(c). It would not have mattered, in other words, whether waters were deemed a "portion" of a CSU or not because, either way, NPS would have plenary authority to regulate them under § 100751(b).[2]

The practical implications of NPS's interpretation confirm its implausibility. Accepting NPS's argument would grant the agency unfettered power to regulate all waters located "within" a CSU—even those located entirely on State, Native Corporation, or private lands. A pond or stream on Native Corporation-owned land in the uplands of Alaska would suddenly become subject to NPS management of "activities on or relating to" that water under § 100751(b). Not only would that override Congress's decision to define such waters as non-public, it is antithetical to ANILCA's purpose. Pet. Br. 5-9; *infra* 11-15.

ANILCA expanded the National Park System by more than 43 million acres (roughly the size of Missouri),

2. NPS asserts (at 27) that Section 103(c) "does not mention navigable waters." But there was no need to use the word "navigable" because ANILCA includes all "waters" in the definition of "land" in 16 U.S.C. § 3102(1).

and one of the statute's overriding objectives was to ensure that NPS could *not* exercise jurisdiction over the non-federal lands and waters that happened to fall within the CSU boundaries. Pet. Br. 5-9. That is precisely why ANILCA employed the concept of "public lands" and limited federal authority to such areas. But under NPS's rationale, this was largely a waste of Congress's time because NPS retained authority under the Organic Act to regulate *all* waters within a CSU regardless of whether they constitute "public lands." NPS's view of the law cannot be squared with the text of ANILCA and would eviscerate the compromise at the heart of the statute.

Pointing to the second sentence of Section 103(c), NPS further contends that the limitations on its authority are confined to "one particular class of Park Service regulations: the 'regulations applicable *solely to public lands* within such [CSUs].'" Resp. Br. 30 (quoting 16 U.S.C. § 3103(c)). NPS argues, in other words, that ANILCA is inapplicable to regulations that apply to both public and nonpublic lands because, rather conveniently, such rules would not apply "solely" to public lands.

That argument is circular and would deprive Section 103(c) of any meaning. Worse still, it would allow NPS to control the scope of its own authority: the agency could regulate any non-federal land or water (State, Native Corporation, or private) merely by issuing a regulation to that effect. It would defy logic—and contravene Congress's express intent—to interpret Section 103(c)'s second sentence as creating a massive loophole through which NPS could evade any limits on its authority merely by extending a regulation to both public and non-public lands.

Realizing that its argument would render Section 103(c) largely meaningless, NPS argues (at 31-32) that it would be limited to promulgating "certain water-related rules" and rules that are "necessary or proper for the use and management of" public lands. But, tellingly, NPS does not identify any *specific* types of regulations that Section 103(c) would prohibit it from issuing. Nor can it. If NPS is correct (at 28-29) that it possesses authority to issue rules concerning water and anything "*relating to* water located within System units," 54 U.S.C. § 100751(b) (emphasis added), then there would be few (if any) limitations on its management authority over State, Native Corporation, and private lands within the Alaska CSUs. *See* Alaska Amicus Br. 36 ("Allowing regulation of Alaska's lands and waters on the theory that they 'relat[e] to' public lands would eviscerate § 103(c) and contravene the intent of Congress.").[3]

3. NPS's citation of rules regarding waste disposal or hazardous activities (at 32) is especially misguided. The solid waste regulations were issued pursuant to specific congressional authorization enacted after ANILCA. In 1984, Congress passed Public Law 98-506, 98 Stat. 2338 (codified at 16 U.S.C. § 460l-22(c)), which expressly prohibited solid waste sites "within the boundary of any unit of the National Park System[.]" To the extent the solid waste regulations were a legitimate exercise of NPS extraterritorial authority in Alaska—a subject on which Mr. Sturgeon takes no position—that authority came from Congress's separate enactment of Public Law 98-506, not anything in NPS's Organic Act. NPS acknowledged this in a 1994 rulemaking, explaining that the "regulations implement those statutory provisions." 59 Fed. Reg. 65,948 (Dec. 22, 1994).

B. The Other Provisions of ANILCA Cited by NPS Do Not Justify Its Assertion of Jurisdiction.

NPS points to several other ANILCA provisions in an attempt to bolster its textual arguments. Specifically, NPS (at 17-18, 28, 30-31) repeatly cites 16 U.S.C. § 3191(b)(7) for the proposition that its regulatory authority is not limited to public lands. That provision of ANILCA directs NPS to prepare unit management plans containing various categories of information, including a description of "privately owned areas, if any, which are within such unit" as well as the "activities carried out in ... such areas," and the "methods (such as cooperative agreements and issuance or enforcement of regulations) of controlling the use of such activities to carry out the policies of this Act and the purposes for which such unit is established or expanded." *Id.* Based on that reference to "privately owned areas," NPS infers that its authority must extend beyond just public (*i.e.*, federal) lands. That is incorrect.

NPS glosses over the very next provision of ANILCA, which grants it authority to acquire non-federal land in Alaska CSUs from State, Native Corporation, and private landowners. *See* 16 U.S.C. § 3192. Once acquired, such lands "become part of the unit" and are "administered accordingly." *Id.* § 3103(c). Congress would not have needed to authorize acquisition of these non-federal lands if NPS already possessed plenary regulatory authority over them. Indeed, under NPS's interpretation of ANILCA, there would be no need for NPS to *ever* acquire non-federal land under Section 3192 because NPS could achieve the same policy goals by regulating the land directly.

More fundamentally, NPS would extrapolate from Section 3191's oblique reference to potential regulation of privately held land the unfettered authority to regulate all private, Native Corporation, and State-owned lands and waters in contravention of Section 103(c). NPS thus ignores the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014). Congress contemplated that NPS could regulate non-federal lands located in CSUs by acquiring them, entering into a cooperative agreement with the owner, issuing rules pursuant to a specific grant of authority, or through a combination of these approaches. But the overall statutory scheme is designed to ensure non-federal lands are not regulated as though they were part of the National Park System. NPS's interpretation of Section 3191 would render Sections 3192 and 103(c) surplusage and should be rejected. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).[4]

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4. Nor do the cooperative agreements themselves support NPS's position. For example, the Gates of the Arctic management plan recognizes that, within park boundaries, the "beds of waters that are navigable . . . are owned by the State of Alaska" and that "[t]he State of Alaska has authority to manage water based on the Submerged Lands Act of 1953, the Alaska Statehood Act of 1958, and the state constitution." National Park Service, Gates of the Arctic General Management Plan 261 (2015), https://bit.ly/2C6VB9b. The plan also directs NPS to "work with the state on a case-by-case basis to resolve issues concerning the use of waterways where management conflicts arise." *Id.* at 262.

NPS's invocation (at 42-43) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1271, *et seq.*, is also misplaced. The Nation River where Mr. Sturgeon sought to use his hovercraft has *not* been designated as a wild or scenic river. *See* 16 U.S.C. § 1274. But NPS's arguments are wrong as a general matter. Far from supporting expansive jurisdiction over waters in Alaska, ANILCA modified the Wild and Scenic Rivers Act to specify that, in Alaska, the acreage included along with a river being designated "shall not include any lands owned by the State or a political subdivision of the State nor shall such boundary extend around any private lands adjoining the river in such manner as to surround or effectively surround such private lands." 16 U.S.C. § 1285b. The Wild and Scenic Rivers Act also acknowledges and protects State ownership rights in submerged lands, *see* 16 U.S.C. § 1284(f) ("Nothing in this chapter shall affect existing rights of any State, including the right of access, with respect to the beds of navigable streams, tributaries, or rivers (or segments thereof) located in a national wild, scenic or recreational river area."), and preserves State authority over fish and wildlife, *see id.* § 1284(a). That statute provides no support for NPS's position.

C. ANILCA's History and Purpose Reinforce Its Textual Limitations on NPS's Authority.

Section 103(c)'s limitations on NPS's authority to regulate non-federal lands and waters within CSUs reflect ANILCA's "two stated goals," *Sturgeon*, 136 S. Ct. at 1066, of balancing conservation with Alaskan economic development and self-sufficiency, 16 U.S.C. § 3101(d). Section 103(c) reflects Congress's balanced approach and implements its understanding "that Alaska is often the

exception, not the rule." *Sturgeon*, 136 S. Ct. at 1071; Pet. Br. 6-9, 29-31.

Throughout its brief, NPS (at 2, 5-6, 16, 19, 23, 34-35, 40-41, 43, 48) nevertheless presents a hopelessly one-sided version of ANILCA's purposes, focusing almost exclusively on environmental concerns. It is not until page 48 of its 57-page brief that NPS acknowledges in passing that ANILCA also sought to pursue "other aims" such as "safeguard[ing] private and commercial activity." According to NPS (at 48), the Court need not trouble itself with those purposes because they are "limited" and "the Park Service generally retained authority to regulate conduct on navigable waters." But far from being a minor or secondary concern, Congress understood the importance of providing "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people," and that those interests must be pursued "at the same time" as ANILCA's conservation-related goals. 16 U.S.C. § 3101(d).

ANILCA is replete with provisions demonstrating how Congress sought to balance conservation with "the economic and social needs" of Alaskans. *Sturgeon*, 136 S. Ct. at 1070-71; *see also* Ahtna Amicus Br. 36 (arguing that "the legislative history clearly demonstrates that Section 103[] was added specifically to preserve State, Native, and private control over lands within areas included within CSUs"). This Court should reject NPS's efforts to disregard the economic and social purposes of ANILCA, elevate the conservation purposes above all else, and then claim unfettered authority to implement its cherry-picked statutory objectives.

NPS (at 50-51) also tries to downplay the importance of Section 103(c) by arguing that its "placement" and the "manner in which Congress added" it show that it was merely an afterthought. But Section 103(c) is a federal statute, and this Court should decline NPS's invitation to assign less weight to this provision based on its section heading or placement. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Regardless, it is hardly anomalous that a statutory provision addressing the regulatory treatment of the lands and waters within CSUs would be placed in a section labeled "Maps." ANILCA is about geographic boundaries, and it relies on maps—rather than legal descriptions—to establish those boundaries. *See* 16 U.S.C. § 3103(a) ("In the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling.").

Nor is this, as NPS contends (at 50-51) an "elephants in mouseholes" situation. ANILCA has more than 100 sections, yet the "Maps" provision comes *third*—following only the preamble and definitions sections. *See* Pub. L. No. 96-487, 94 Stat. 2371, § 103 (1980). Far from being buried in a "mousehole," the Maps section is front and center in the statutory scheme.

NPS's discussion (at 51-52) of ANILCA's legislative history fares no better. NPS is flatly wrong to characterize Section 103(c) as an unimportant, last-minute technical correction. This provision was originally located in Section 810(c) of H.R. 3651, the "Udall-Anderson" bill

that eventually became ANILCA. *See* H.R. 39, 96th Cong. (1979). After the House version of ANILCA passed, *see* 125 Cong. Rec. 11,458-59 (1979), it was replaced with the Senate's version, which did not include Section 810(c), *see* 126 Cong. Rec. 21,891 (1980); H.R. 39, 96th Cong. (1980). When Congress realized the language had been omitted during the reconciliation process between the House and Senate versions of the statute, it was immediately restored by H.R. 452, a House Concurrent Resolution, before ANILCA was signed into law. 126 Cong. Rec. 30,495-500 (1980); *see* H.R. Con. Res. 452, 96th Cong. (1980).

NPS (at 52) relies solely on a partial quotation from Representative Udall to support its characterization of Section 103(c) as a minor technical correction. Even if NPS's quotation of Representative Udall were accurate and probative, it would fail to reconcile NPS's interpretation with the overall context that led to the introduction and passage of the language that became Section 103(c). "The central issue of [ANILCA's] floor debates was the appropriate balance between exploitation of natural resources, particularly energy resources, and dedication of land to conservation units." *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 553 (1987).

But NPS's quotation is not accurate because it omits important aspects of Representative Udall's statements. Representative Udall, one of ANILCA's sponsors, had earlier explained at length that ANILCA's inclusion of ANCSA (*i.e.*, Native Corporation) lands within CSU boundaries should not be construed as subjecting those lands to federal regulation. *See* 125 Cong. Rec. 9,905 (1979) (statement of Rep. Udall). When the concurrent resolution reinserting Section 103(c) into ANILCA (H.R.

452) was introduced, he reiterated that it would not change ANILCA in any material respect—including its protection of ANCSA lands from regulation. He characterized H.R. 452 as containing some changes that were "technical or perfecting in nature," but also others that "[we]re more extensive." 126 Cong. Rec. 30,498 (1980) (statement of Rep. Udall). And Representative Udall was emphatic that Section 103(c) would ensure that "only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands." *Id.*; *see* Pet. Br. 5-9.[5]

D. Congress Has Not "Ratified" NPS's Interpretation of "Public Lands."

NPS's argument (at 37-40) that Congress "ratified" its interpretation of "public lands" through a series of funding bills in 1996, 1998, and 1999 is misplaced. "[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996). Even putting that aside, NPS's ratification arguments fail for several independent reasons. At the outset, the funding bills cited by NPS

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5. NPS's assertion (at 46-47) that respecting Alaska's authority over its navigable waters would create an unworkable jurisdictional "patchwork" is unpersuasive. To the extent that ANILCA creates a "patchwork," it is the inevitable byproduct of Congress's decision to exclude private, Native Corporation, and State lands and waters from CSUs. This approach is hardly unique to ANILCA. For example, under the Wild and Scenic Rivers Act, only designated portions of rivers qualify for inclusion under the statute. 16 U.S.C. § 1274. Navigability in general, moreover, must always be determined on a "segment-by-segment basis." *PPL Montana v. Montana*, 565 U.S. 576, 593 (2012).

pertained only to ANILCA's subsistence-use provisions in Title VIII, which do not dictate the outcome here. *See* Pet. Br. 34 n.4; *infra* 20-21.

Moreover, "ratification" requires Congress to place its affirmative imprimatur on an agency interpretation. The very case cited by NPS, *CFTC v. Schor*, 478 U.S. 833 (1986), makes clear that ratification occurs when Congress enacts "positive legislation" codifying an agency's position into the statutory text, *id.* at 846. Here, none of the funding bills cited by NPS amended ANILCA's definitions or substantive provisions regarding "public lands."

To the contrary, the funding bills only temporarily delayed the subsistence regulations to afford Alaska an opportunity to address this issue in the first instance. After Alaska failed to meet the deadline, the funding moratorium lapsed and the regulations took effect. But, far from endorsing any particular position about the regulations or the underlying legal rationale, Congress carefully refrained from weighing in on the merits of the matter. *See* Pub. L. No. 104-134, § 336, 110 Stat. 1321 (1996) ("None of the funds made available to the Department of the Interior or the Department of Agriculture by this or any other Act may be used to issue or implement final regulations, rules, or policies pursuant to Title VIII of [ANILCA] to assert jurisdiction, management, or control over navigable waters transferred to the State of Alaska ... ."); Pub. L. No. 105-277, § 339(d), 112 Stat. 2681 (1998) ("Nothing in this section invalidates, validates, or in any other way affects any claim of the State of Alaska to title to any tidal or submerged land in Alaska.").

E. The Reserved Water Rights Doctrine Cannot Convert the Nation River into "Public Land."

Although its primary argument focuses on the Organic Act, NPS (at 32-37) argues in the alternative that the navigable rivers within Alaska CSUs are, in fact, "public lands" under ANILCA. But because NPS concededly lacks title to these lands, it asserts as a fallback that it need only show a federal "interest" in the relevant waters in order to regulate them as public lands.

There is a good reason why NPS did not lead with this argument. It rests on a highly selective quotation of the statute. The word "interests" appears only in the definition of "land," which "means "lands, waters, and interests therein." 16 U.S.C. § 3102(1). NPS would stop there and claim authority. But ANILCA does not stop there. Section 103(c) and the related definitions provide that "public land" means in relevant part "Federal lands," which are defined as "lands the title to which is in the United States after December 2, 1980." 16 U.S.C. §§ 3102(2)-(3). In short, "interests" alone are not enough; instead, ANILCA requires that *title* to any such "interests" must be vested in the United States.[6]

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6. NPS (at 32-33) cites *Amoco*, 480 U.S. 531, for the proposition that a federal "interest" is sufficient to constitute "public lands" regardless of title. But *Amoco* merely held that the Outer Continental Shelf was not covered by a provision of ANILCA that applied to federal lands "in Alaska." *Id.* at 548-49. This Court was "hesita[nt]" to address the precise scope of the "title" requirement because it was unnecessary to the Court's holding, and nothing in *Amoco* purports to resolve that issue. *Id.* at 548 n.15.

NPS thus misses the point altogether when it devotes several pages (at 34-36) to arguing that it has "interests" in the navigable waters in Alaska, pursuant to the reserved water rights doctrine, that give it regulatory authority. The cases cited by NPS—which Mr. Sturgeon has already addressed at length, Pet. Br. 34-41—merely hold that the government is entitled to a sufficient volume of water to accomplish the objectives of reserved federal lands. *See, e.g., Cappaert v. United States*, 426 U.S. 128 (1976) (government entitled to sufficient volume of water to preserve the "scientific value" of a geothermal pool in a limestone cavern); *Arizona v. California*, 373 U.S. 546, 599 (1963) (desert Indian reservation entitled to a volume of water "essential to the life of the Indian people"). But this Court has never held that a reserved water right confers plenary regulatory power over the body of water at issue. To the contrary, the Court has emphasized that "[t]he implied-reservation-of-water-rights doctrine ... reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141.

The hovercraft ban exceeds the scope of any reserved water rights the United States might hold, even if that doctrine applies. Pet. Br. 37-41. NPS's only response is to again retreat to the Organic Act and generalized assertions of statutory purpose. NPS Br. 34-35, 37. But generalities cannot change the reality that hovercraft use has no effect on the volume of water available for federal purposes, nor does it result in—to use NPS's own words (at 34)—"depletion or diversion" of water. Whatever the scope of the reserved water rights doctrine, it cannot justify a hovercraft ban—let alone plenary NPS jurisdiction over non-public waters.

Finally, NPS argues (at 36) that a reserved water right is, in fact, a title interest that satisfies ANILCA's definition of "public lands." That argument is inconsistent with the brief in opposition and the Ninth Circuit's decision, both of which conceded that the United States does not hold title to navigable waters. *See* Br. in Opp. 14 ("'[N]either sovereign nor subject can acquire anything more than a mere usufructuary right' in navigable waters."); Pet. App. 17a ("Water cannot be owned."). The three cases NPS cites in support of its position are wholly inapposite. In *Federal Power Commission v. Niagara Mohawk Power Corporation*, 347 U.S. 239 (1954), this Court held that "the water itself, the corpus of the stream, *never becomes or, in the nature of things, can become, the subject of fixed appropriation or exclusive dominion*, in the sense that property in the water itself can be acquired or become the subject of transmission from one to another," *id.* at 247 n.10 (emphasis added). And the other two cases cited by NPS use the word "title" in passing but do not contain any analysis of whether a reserved water right equates to a "title" interest in such water. *See Crum v. Mt. Shasta Power Corp.*, 30 P.2d 30 (Cal. 1934); *Racliff's Ex'rs v. The Mayor*, 4 N.Y. 195 (1850). Cases that have actually addressed the question hold that "the navigational servitude and reserved water rights are not the type of property interests to which title can be held." *Totemoff v. State*, 905 P.2d 954, 965 (Alaska 1995); *see also Kohl Indus. Park Co. v. Rockland County*, 710 F.2d 895, 903 (2d Cir. 1983) ("[I]n the absence of limiting language, 'title' is commonly understood to mean a fee interest," not merely a lesser interest such as an easement.).

F. There is No Need for this Court to Address the *Katie John* Line of Decisions.

Finally, NPS (at 41-42, 47-50) argues that the subsistence priority provisions in Title VIII must mean that ANILCA did not foreclose NPS regulation of Alaska's navigable waters flowing through CSUs. But Title VIII is irrelevant to discerning what authority ANILCA granted to NPS. Title VIII was one of the distinct sections added to ANILCA to address ongoing issues related to ANCSA; it was not directly related to the creation of CSUs. As noted, it has its own preamble and is the only section of ANILCA to invoke Commerce Clause authority. Pet. Br. 33-34 & n.4. Title VIII stands alone as a broad grant of federal authority to regulate and support traditional subsistence uses in Alaska, and this Court need not reach any issues regarding subsistence uses to rule in Mr. Sturgeon's favor. *See* Alaska Amicus Br. 29-35 ("The *Katie John* decisions are not at issue in this appeal...."); Ahtna Br. 30-36 ("[A]ny decision by this Court should leave undisturbed the subsistence priority established by the *Katie John* decisions.").

NPS laments (at 48-50) that leaving the subsistence priority in place would lead to two definitions of "public lands" within ANILCA. But this Court has recognized that the "presumption of consistent usage" is only a presumption—not an ironclad rule—and must sometimes yield to the broader statutory context. *Utility Air*, 134 S. Ct. at 2441. In light of Title VIII's unique text, preamble, purpose, and source of congressional authority, a ruling in favor of Mr. Sturgeon would not affect the existing

definition of "public lands" in the subsistence context.[7] Regardless, that issue is beyond the scope of the question presented and need not be resolved here.

III. If Any Interpretive Canon Applies Here, It Is the Federalism Canon, Not *Chevron* Deference.

NPS's halfhearted plea (at 55-57) for *Chevron* deference should be rejected, as ANILCA is unambiguous and NPS's position is unreasonable. NPS made the same plea for *Chevron* deference the last time the case was before this Court, *see* Resp. Br. at 44-46, *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016) (No. 14-1209), but this Court declined.

NPS's argument should fare no better this time. Even though Section 103(c) is designed to *limit* NPS's authority over non-federal land, NPS (again) interprets it to impose no meaningful limit on NPS's authority to regulate non-federal lands within CSUs. Any construction of Section 103(c) that allows NPS to regulate non-federal lands in CSUs as though they were part of the National Park System—an outcome that ANILCA was expressly intended to avoid—is, by definition, unreasonable.

NPS's plea for deference also violates the clear statement rule. This Court rejects "request[s] for administrative deference" to "avoid [] significant

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7. Contrary to NPS's suggestion (at 50), *Amoco* does not foreclose this result. The issue in that case was when land is deemed to be "in Alaska." *Amoco*, 480 U.S. at 547-48. The Court did not directly analyze—much less decide—the meaning of "public lands" in the context of ANILCA's subsistence provisions. *See supra* n.6.

constitutional and federalism questions." *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001); *see also Miller v. Johnson*, 515 U.S. 900, 923 (1995). If there is to be any thumb on the scale in the interpretation of ANILCA, it should weigh in the State's favor under the clear statement rule. *See* Pet. Br. 31-34; *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.").

Alaska's navigable rivers are indispensable to the economic, social, and cultural life of its citizens. *See* Alaska Amicus Br. 6-17. Those issues go to the core of why ANILCA limited federal power over Alaska's CSUs. Especially in an area as remote and sparsely populated as Alaska, the State has a sovereign obligation to "ensure open access to its waters for navigation, fishing, and commerce." *Id.* at 9-10. Moreover, numerous towns and villages in Alaska are not accessible by road and can be reached only by boat, airplane, snowmachine, all-terrain vehicle, or other unconventional modes of transportation. *Id.* at 11-12. It strains credulity for NPS to suggest (at 53-55) that there are no federalism implications when a federal agency overrides a state government's judgments about how its citizens can travel through remote and difficult-to-reach areas. Nothing in ANILCA comes close to providing the clear statement needed to displace Alaska's sovereignty in this manner. *See* Idaho *et al.* Amicus Br. 4-9.

Last, NPS (at 53-54) makes the surprising assertion that the clear statement rule should run in its favor

because Mr. Sturgeon is trying to usurp its "traditional" power over navigable waters. But NPS has no "traditional" authority, only the authority it is conferred by statute. "[A]n agency literally has no power to act ... unless and until Congress confers power on it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, in His Official Capacity as Alaska Regional Director of the National Park Service, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF FOR AHTNA, INCORPORATED IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

This brief is submitted on behalf of *amicus curiae* Ahtna, Incorporated ("Ahtna"), which is an Alaska Native Regional Corporation created pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-1629.

Ahtna represents the interests of 2,021 Alaska Native shareholders and owns lands and resources located within conservation system units ("CSUs")[2] managed by various federal agencies. Ahtna is charged with advancing the interests of its shareholders, many of whom have limited incomes and live in remote locations. But Ahtna represents more than just a corporation.

The Ahtna Athabascan people have occupied east-central Alaska for more than 5,000 years. B.A. Potter, *Exploratory Models of Intersite Variability in Mid and Late Holocene Central Alaska*, 61(4) ARCTIC 407-25 (Dec. 2008). They thrived in this bountiful region by following the rhythm of the seasons: fishing in the lakes in the spring, fishing the mighty Copper River

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its shareholders, or its counsel made a monetary contribution to its preparation or submission.

[2] Conservation system units, or "CSUs," are defined to mean "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument[.]" 16 U.S.C. § 3102(4).

(or "Atna" in the Ahtna language) for salmon in the summer, harvesting berries in the late summer and fall, and hunting for moose and caribou in the fall. Due to the long, cold winters, successful fishing, hunting, and gathering were crucial for survival. But it was not just about survival; these activities were the very fabric of the Ahtnans' social, political, and religious identity. What the federal government defines as "subsistence," is their customary and traditional way of life.

Unfortunately, since the 1898 Klondike Gold Rush, this customary and traditional way of life has been under constant threat. W.E. Simeone, Ph.D., *Ahtna, The People and Their History* 206 (Ahtna, Inc. 2018). Population booms, and the development of road access into the heart of the Ahtna region after World War II, created significant competition for hunting and fishing resources.[3] The competition over limited fish and game resources increased when the State of Alaska gained regulatory control over fish and game and arbitrarily restricted subsistence fishing in the region without consulting the Ahtna people. The results were disastrous. The State's restrictions eliminated traditional Ahtna fishing sites, eviscerated a crucial food source,

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[3] Notably, there were 9,000 resident hunting licenses sold in 1946. By 1955/56, that number had increased to 31,500. Morgan Sherwood, *Big Game in Alaska: A History of Wildlife and People* 143 (Yale University Press 1981). Between 1960 and 1970, Salmon fishing permits on the Copper River increased a staggering 96 percent. W.E. Simeone, Ph.D. & J. Fall, *Patterns and Trends in the Subsistence Salmon Fisher of the Upper Copper River* 21-32 (2003).

and made it difficult to dry fish in the traditional manner. Simeone 206-07.

Since that time the Ahtna people have been forced to spend tremendous resources and energy litigating to protect their customary and traditional way of life. Even after the promises made in ANCSA and the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3101 *et seq.*, where Congress enacted a law designed to protect "the continuation of the opportunity for subsistence uses by rural residents of Alaska [because it] is essential to Native physical, economic, traditional, and cultural existence. . . .", *id.* at § 3111(1), the State of Alaska continued to unduly restrict access to Ahtna's fish and game resources. It was only with the landmark *Katie John*[4] decision that the Ahtna people began to secure meaningful protection for their customary and traditional way of life.

This case has extraordinary importance to Ahtna and its shareholders for two reasons.

First, a decision that undermines, directly or indirectly, subsistence rights will violate ANILCA and have devastating repercussions for Ahtna's customary and traditional way of life. Preservation of this way of life is of the utmost importance to Ahtna.

Second, a decision from this Court that expands federal authority beyond the powers granted to federal land management agencies (like the National Park

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[4] *State of Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) ("*Katie John I*").

Service ("NPS")) will have deleterious effects on Ahtna's ability to develop its lands and resources for the benefit of its shareholders as promised in ANCSA and ANILCA.

Ahtna, therefore, asks this Court to strike a careful balance. Fortunately, this can be accomplished by harmonizing the relevant provisions of ANILCA.

SUMMARY OF ARGUMENT

Although the instant case does not involve Title VIII of ANILCA, the Ninth Circuit Court of Appeals implicated the subsistence priority by relying on *Katie John*, which is a decision that interpreted Title VIII, to construe the meaning of separate and distinct provisions of ANILCA. This Court should not follow the Ninth Circuit's lead but should, instead, issue a decision that acknowledges that (i) the extent of federal authority under Title VIII is separate and distinct from federal authority under the rest of ANILCA and (ii) case law applying Article VIII should not be relied on to define the scope of federal land management agencies' conservation-based regulations within CSUs.

In 1995, the Ninth Circuit adjudicated a case regarding the scope of "public lands" under Title VIII—specifically, whether the term "public lands" encompasses navigable waterways for purposes of the subsistence priority. *Katie John I*, 72 F.3d 698. Correctly recognizing the clear congressional intent to maintain a priority for subsistence fishing—most of which occurs

on navigable waterways—the Ninth Circuit held that navigable waterways in which the United States holds a reserved water right are "public lands" for purposes of Title VIII, and that the subsistence priority therefore applies to such waterways. *Id.* at 704; *see also id.* at 702 ("[W]e have no doubt that Congress intended that public lands include at least some navigable waters."). That decision was upheld by an *en banc* panel in 2001, *John v. United States*, 247 F.3d 1032 (9th Cir. 2001) ("*Katie John II*"), and the application of the subsistence priority to specific waters was finally resolved in a related suit decided in 2013, *John v. United States*, 720 F.3d 1214, 1218 (9th Cir. 2013) ("*Katie John III*").

In short, the *Katie John* trilogy resolved the hotly contested issue of which Alaskan waters qualify for the subsistence priority and who gets to manage subsistence rights over these waters.

Unfortunately, in the opinion below the Ninth Circuit failed to appreciate the uniqueness of Title VIII. Instead of acknowledging Congress's special emphasis on the subsistence priority, the court bootstrapped the *Katie John* decisions onto the instant dispute—even though the present litigation does not involve subsistence priority issues. In doing so, the Ninth Circuit simply assumed that "public lands" has the same meaning under Title VIII as it does throughout the rest of ANILCA.

This reasoning is erroneous. As a threshold matter, it ignores the *Katie John I* court's explanation that its interpretation of the "definition of public lands is

necessary to give meaning to [Title VIII's] purpose of providing an opportunity for a subsistence way of life" and that its "interpretation of the term public lands in this case will not allow the United States to usurp state power over navigable waters elsewhere." *Katie John I*, 72 F.3d at 702 n.9.

More importantly, the opinion below violates "the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (quotation omitted). Even though ANILCA does not define "public lands" differently in Title VIII as compared to the rest of the statute, this Court has recognized that the "ordinar[y]" presumption that "identical words used in different parts of the same [statute] are intended to have the same meaning" "readily yields to context, and a statutory term—even one defined in the statute—may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (quotation omitted).

Thus, an analysis of the meaning of "public lands" under various provisions of ANILCA is incomplete if it fails to consider that Congress exercised different authority to achieve the subsistence priority than it did to achieve the rest of ANILCA's goals. Regardless of how this Court interprets "public lands" for purposes of adjudicating whether the NPS has the authority to enforce a hovercraft ban on navigable waterways,

"public lands" should not be deemed to categorically exclude navigable waterways for purposes of Title VIII. A ruling to the contrary would run afoul of congressional intent and established principles of statutory interpretation, *see Burwell*, 135 S. Ct. at 2492, and disturb the hard fought compromise that gave meaning to Title VIII.

BACKGROUND

The Ninth Circuit's decision below found that the NPS can exercise regulatory control over the water column flowing over private lands (*i.e.*, the State and Alaska Native Corporation owned lands) located within the boundaries of the National Park System in Alaska. *Sturgeon v. Frost*, 872 F.3d 927, 934-35 (9th Cir. 2017). The court empowered the NPS to control access and use of navigable waters in Alaska by extending the reach of *Katie John I*, which is grounded in Title VIII of ANILCA and addresses distinct issues related to subsistence rights. The outcome of this case may, therefore, turn on how this Court construes *Katie John*. But to properly understand *Katie John*, it is necessary to discuss (i) the historic relationship between the United States, Alaska, and Alaska Natives, and (ii) how Congress resolved Native land claims and aboriginal rights.

Federal Oversight of Alaska: 1867 to 1958

The Russian Governor of Alaska, Alexander Baranof, reportedly said that "God is in Heaven and St. Petersburg is far away." Substitute Washington, D.C. for St. Petersburg and this is largely the epitome of the United States' relationship to Alaska and Alaskans until Statehood.

The United States purchased Alaska from Russia on March 30, 1867. *Sturgeon v. Frost*, 136 S. Ct. 1061, 1064 (2016). The 1867 Treaty of Cession did little to create a functioning government and provided scant guidance on what rights Alaska Natives retained; the Treaty merely provides that "[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to the aboriginal tribes of that country." Treaty Concerning the Cession of the Russian Possessions in North America, Mar. 30, 1867, 15 Stat. 539.

After acquiring Alaska, the federal government exhibited little interest in the new territory for the first 17 years. Ernest Gruening, *The State of Alaska* 33-43 (Random House 1968). Federal oversight essentially amounted to an "era of total neglect" for citizens and Alaska Natives alike. Gruening at 33-43. Natives, "who constituted an overwhelming majority of its approximately thirty thousand souls, were as devoid of attention, or even mention, as was the population as a whole." Gruening at 355; *see also Tlingit and Haida Indians of Alaska v. United States*, 177 F. Supp. 452, 456-59, 464-67 (Fed. Cl. 1959).

The passage of the Organic Act of Alaska, 23 Stat. 24 ("Organic Act") in 1884 nudged the federal government's oversight from "total neglect" to "flagrant neglect." Gruening at 47-78. The Organic Act created a civil government and provided some governing authority by making Alaska a civil and judicial district controlled by the general laws of the State of Oregon "so far as they may be applicable," and also "not in conflict with the provisions of this act or the laws of the United States." 23 Stat. 24, 26.

With respect to Alaska Natives, the Organic Act was the first effort by Congress to enact laws intended to protect them "in the possession of any lands actually in their use or occupation." David S. Case & David A. Voluck, *Alaska Natives and American Laws* 24 (University of Alaska Press, 3d ed. 2012); *id.* at 114-15 (based on this law, judicial decisions upheld possessory rights and expanded the scope of Native title). The Organic Act specifically provided "[t]hat the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."[5] 23 Stat.

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[5] Section 12 also provided that the Secretary of the Interior should investigate "the condition of the Indians of the Territory and for the making of a report on them and what lands, if any, were to be reserved for their use[.]" *Tlingit and Haida Indians of Alaska*, 177 F. Supp. at 465. In 1885, the Secretary issued a report and recommended that Natives "should have deeds to the land they actually used and occupied and that they should be secured in the use of their fishing sites. The Report also recommended that

24, 26. But ultimately during this period little effort was expended on resolving aboriginal rights. Gruening 353-56.

Alaska finally gained attention when, prompted by the first major discovery of gold in the 1880s, Congress enacted a series of laws to cope with the gold rush. Gruening at 63-75. The issue of aboriginal rights, however, continued to be largely ignored. *See United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1015 (D. Alaska 1977) ("Under these laws, appropriate administrative officials authorized entries on, and disposition of, Alaska lands without regard to aboriginal title claims of Natives."); Gruening at 355-63.

This state of neglect did not significantly change until 1904, when President Roosevelt acknowledged the need for the federal government to take on a more energetic role in Alaska. In his State of the Union address, President Roosevelt observed that Alaska had "outgrown its present laws, while in others those laws have been found to be inadequate." President's Annual Message, 39 Cong. Rec. 10, 18 (Dec. 6, 1904) (President Theodore Roosevelt). President Roosevelt specifically stated that the federal government must do more to address the issues facing Alaska Natives. He remarked that for Alaska Natives "[t]heir country is being overrun by strangers, the game slaughtered and driven away, the streams depleted of fish, and hitherto unknown and fatal diseases brought to them, all of which

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the [Natives] be given the same right to acquire land as the white people had." *Id.* at 465-66.

combine to produce a state of abject poverty and want which must result in their extinction. Action in their interest is demanded by every consideration of justice and humanity." *Id.*

To address the deprivations and injustice facing Native Alaskans, President Roosevelt asked Congress to establish hospitals "so that contagious diseases that are brought to them continually by incoming whites may be localized and not allowed to become epidemic, to spread death and destitution over great areas." *Id.* And President Roosevelt requested that Alaska's Governor be provided "with the means and the power to protect and advise the native people, to furnish medical treatment in time of epidemics, and to extend material relief in periods of famine and extreme destitution." *Id.*

Most importantly for the instant case, President Roosevelt requested that the "Alaskan natives should be given the right to acquire, hold, and dispose of property upon the same conditions as given other inhabitants; and the privilege of citizenship should be given to such as may be able to meet certain definite requirements." *Id.*

Consistent with President Roosevelt's State of the Union address, the legislative and executive branches of the federal government undertook periodic efforts to protect Native hunting and fishing rights and allowed for the acquisition of property: In 1906, Congress enacted the Alaska Native Allotment Act, which was intended to significantly increase Native land ownership. 34 Stat. 197. In 1908, Congress amended Alaska's

first game law, 35 Stat. 102, allowing for Natives to take game animals. And in 1942, the Department of the Interior issued an opinion concluding that Natives have broad aboriginal fishing rights, which have "been construed to include the occupancy of water and land under water as well as land above water." Aboriginal Fishing Rights in Alaska, 57 Interior Dec. 461, 474 (Feb. 13, 1942).[6]

Efforts were also made to provide Alaska Natives with civil rights. For example, in 1915, the Territorial legislature granted some Alaska Natives the right to become citizens and, in 1924, Congress passed legislation, 43 Stat. 253, extending citizenship to all Natives. Gruening at 363; *see also Atlantic Richfield Co.*, 435 F. Supp. at 1013-18 (providing overview of federal treatment of Natives prior to Statehood).

But Alaska Natives would have to wait until 1971 for Congress to address their aboriginal rights in a more meaningful manner.

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[6] *See generally Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) (United States filed suit to enjoin a commercial fishing operation from operating in a reservation established to protect Natives' fishing rights); *United States v. Libby, McNeil & Libby*, 107 F. Supp. 697 (D. Alaska 1952) (discussing the federal efforts to reserve fishing rights for Natives); *Tlingit and Haida Indians of Alaska v. United States*, 177 F. Supp. 452 (Fed. Cl. 1959) (discussing Native land claims and federal efforts to protect hunting and fishing); *Metlakatla Indian Cmty., Annette Islands Reserve v. Egan*, 369 U.S. 45 (1962) (discussing federal efforts to protect Native fishing rights).

Native Alaskans' Socio-Economic Struggle

The failure to adequately address aboriginal rights, including fishing and hunting rights, had dire consequences for many Alaska Natives. A 1954 health survey report on Alaska Natives prepared for the Department of the Interior ("Parran Report") noted that "the indigenous peoples of Native Alaska are the victims of sickness, crippling conditions and premature death to a degree exceeded in very few parts of the world." Thomas Parran et al., Alaska's Health: A Survey Report to the United States Department of the Interior 143 (1954), *available at* http://www.dhss.alaska.gov/Commissioner/Documents/PDF/Parran_Report.pdf. "It is easy to understand why these people, once among the hardiest of the northern races, now are noticeably depressed in the autumn and dread the winter—not because of the coming of the long twilight and the harsh cold, but because of the certain lack of food[.]" *Id.* at 49. The Parran Report stated that approximately 35,000 Natives lived at a "marginal or sub-marginal subsistence level." *Id.* at 16. And at Statehood, the infant mortality rate for Natives was among the highest in the world and life expectancy was 34.7 years, "while his fellow Alaskan who happened to be white could expect to live for 70 years." Gruening at 544.

The Parran Report concluded that the deplorable conditions facing Alaska Natives were caused by three main factors: (i) the federal government's mismanagement of Alaska; (ii) "the great proportion of its industry owned by non-residents uninterested in the development of the Territory"; and (iii) the country's indifference

to the plight of Native Alaskans.[7] *Id.* at 12-15, 22-23. The Parran Report advised that the conditions could be remedied if the federal government addressed, among other things, unemployment and protected hunting and fishing rights. *Id.* at 16-17, 22-23, 49.

Statehood Act Preserves the Status Quo

During the debates over Alaska Statehood, Congress considered Native fishing to be "of vital importance to Indians in Alaska" and noted that the "existence of aboriginal fishing rights was affirmed by the Interior Department's Solicitor in 1942." *Organized Village of Kake v. Egan*, 369 U.S. 60, 66 (1962).

Yet, consistent with the long history of neglecting aboriginal rights, Congress failed to settle the Native land claims in the Alaska Statehood Act. Instead, Congress opted to preserve the status quo. Section 4 of the Statehood Act provides:

> As a compact with the United States said State [Alaska] and its people do agree and declare that they forever disclaim all right and title to any lands or other property not

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[7] "It seems incongruous that Americans, who have been critical during the past hundred years of the deficiencies in colonial policies of other nations, have been oblivious of the destitution, demoralization and death among the native peoples of Alaska, which has been an American responsibility since 1867. . . . Every good American should applaud the action of the Congress in authorizing $300 million for famine relief in other countries. But, in all honor, this charity should begin with the relief of native Americans in our own Territory." Parran Report at 49, 312.

> granted or confirmed to the State . . . under the authority of this Act, the right or title to which is held by the United States . . . and to any lands or other property (including fishing rights), the right or title to which *may be held* by any Indians, Eskimos, or Aleuts (hereinafter called natives) or held by the United States in trust for said natives. . . ."

72 Stat. 39 § 4 (emphasis added). Thus, Section 4 requires the State to disclaim right and title to Native property; the United States retains "absolute jurisdiction and control" over it for the benefit of Alaska Natives; and the State may not tax it. *Organized Village of Kake v. Egan*, 369 U.S. 60, 62 (1962).

After Statehood, tensions rose over the State's decision to select lands occupied and used by Alaska Natives. *See, e.g.*, *State of Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969); *Atlantic Richfield Co.*, 435 F. Supp. at 1015-13. The conflict was intensified by the State of Alaska's management of fish and game. Upon assuming responsibility for fish and wildlife, the State enacted laws that did not provide any preference for subsistence fishing and closed traditional subsistence fisheries, including in the Ahtna region where Katie John and her ancestors had fished for generations. *Katie John I*, 72 F.3d at 701; *John v. United States*, 1994 WL 487830 at *10 (D. Alaska March 30, 1994).

The failure to address aboriginal rights after Statehood exacerbated the haunting plight of Alaska Natives. In 1968, the President of the Alaska Federation of Natives, Emil Notti, testified before Congress

that "the human needs, the suffering and deprivations that exist in the villages are beyond description and are as bad as the worst conditions anywhere in the world. The native people in many areas face a daily crisis just to exist." *Hearings Before the Committee on Interior and Insular Affairs*, United States Senate on S. 2906, 90th Cong. 31 (Feb. 8-10, 1968) (statement of Emil Notti, President, AFN). Notti added: "Controls by the Federal agencies over the resources and lives of native people in Alaska has not met with any success though the reasons can always be rationalized away by those responsible for the failures." *Id.* at 33.

As Notti explained, there was "a strong feeling among the native people in Alaska that they want to have control of their own destiny." *Id.* To do so, Natives needed title to their lands and resources. "We feel we have the ability to make our own way and once we get a fair settlement for our lands, it will enable us to operate our businesses. . . . [I]f we had title to the land we would no longer be a starving people; we would have an economy." *Id.* at 50-51.

ANCSA Settles Land Claims & Extinguishes Aboriginal Fishing Rights

Attempts to resolve Native land claims did not gain traction until the discovery of the Prudhoe Bay oil field in the late 1960s. Just as the gold rush prompted Congress to establish land laws, the rush for oil forced Congress to resolve the Native land claims. *See United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1017-18 (D. Alaska 1977).

In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 *et seq.*, to settle, through grants of a combination of land and money, all "claims by Natives of Alaska." To administer this land and money, Alaska was divided into twelve geographic regions, and the Natives within each region became shareholders in a regional corporation organized under Alaska law. 43 U.S.C. § 1606.

Congress contemplated that land granted under ANCSA would be put primarily to three uses: subsistence, village expansion, and economic development. *See Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991, 996 (9th Cir. 1994). "Of these potential uses, Congress clearly expected economic development would be the most significant" and expected that most of the lands selected by Natives would create opportunities and jobs. *Id.*

But ANCSA also extinguished "any aboriginal hunting or fishing rights that may exist." 43 U.S.C. § 1603(b). Natives gave up these rights because they were led to believe that these rights would be protected by the State and federal agencies. Indeed, Congress also believed that there would be little incentive for Natives to select lands for subsistence use because it was believed that Natives would continue their present subsistence uses regardless of whether the lands were in Federal or State ownership. *Id.*; *see also Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 731 (9th Cir. 1978); *Katie John I* at 700 ("Congress expected that

the state and the federal agencies would protect subsistence hunting and fishing.").

These uncodified promises were, however, unfulfilled.[8]

ANILCA Restores and Codifies Subsistence Rights

After ANCSA, it became evident that two major issues still needed resolution: federal protection for subsistence and classifying the federal government's massive land holdings.[9]

ANILCA, therefore, has three overarching objectives: (i) establish land classifications for federal lands; (ii) preserve economic development rights on State and Native lands located within conservation system units;

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[8] "In the conference report, accompanying ANCSA . . . Congress expressed the clear intention that Alaska Native subsistence interests . . . should be protected by the Secretary of the Interior and the state of Alaska. Neither the Secretary nor the state lived up to these expectations, so it became increasingly obvious that other steps were necessary to protect Alaska Native subsistence." Case & Voluck, *Alaska Natives and American Laws* 291.

[9] *See Katie John I*, 72 F.3d at 700 (discussing subsistence issues as a driving force behind ANILCA); *City of Angoon v. Marsh* 749 F.2d 1413, 1415 (9th Cir. 1984) ("Sometime after the passage of ANCSA, Congress became aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use.").

and (iii) protect subsistence rights. *See Sturgeon*, 136 S. Ct. at 1065; *Katie John III*, 720 F.3d at 1218.

Regarding subsistence, Congress found that Alaska Natives' ability to continue engaging in customary and traditional use of resources was being threatened by Alaska's increasing population. 16 U.S.C. § 3111(3). Congress also acknowledged that "in most cases, no practical alternative means are available to replace the . . . fish and wildlife which supply rural residents dependent on subsistence uses[.]"[10] 16 U.S.C. § 3111(2).[11]

Thus, one of Congress' primary aims in passing ANILCA was to codify the promises made during ANCSA that Native subsistence rights would be protected. Specifically, Congress sought to ensure "the continuation of the opportunity for subsistence uses by rural residents of Alaska." *Id.* § 3111(1). As is evident throughout ANILCA, "Congress places great emphasis on providing rural residents of Alaska with the opportunity to maintain a subsistence way of life." *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1192 (9th Cir. 2000) (citing 16 U.S.C. §§ 3101(c), 3111–3112, 3114); *id.* at 1189 (ANILCA was enacted "to protect the viability of subsistence living"); *United States*

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[10] "[Fifty] percent of the food for three-quarters of the Native families in Alaska's small and medium villages is acquired through subsistence uses, and 40 percent of such families spend an average of 6 to 7 months of the year in subsistence activities." H.R.Rep. No. 1045, 95th Cong., 2d Sess., at 181 (1978).

[11] *See generally* Miranda Strong, *Alaska National Interest Lands Conservation Act Compliance & Nonsubsistence Areas: How Can Alaska Thaw Out Rural & Alaska Native Subsistence Rights?*, 30 Alaska Law Review 71-94 (2013).

v. Alexander, 938 F.2d 942, 945 (9th Cir. 1991) ("Many Alaska natives who are not fully part of the modern economy rely on fishing for subsistence. If their right to fish is destroyed, so too is their traditional way of life.").

To effectuate these objectives, Title VIII of ANILCA requires that "subsistence uses" be given priority over the taking of fish and wildlife for other purposes. 16 U.S.C. § 3114; Case & Voluck, *Alaska Natives and American Laws* 296-301 (providing a comprehensive overview of Title VIII and discussing how it "is intended to carry out the subsistence-related policies and fulfill the purposes of ANCSA").

But, of course, Congress had additional reasons for enacting ANILCA. *See Sturgeon*, 136 S. Ct. at 1065; *Amoco Production Company v. Village of Gambell, Alaska*, 480 U.S. 531, 549 (1987) (ANILCA's "primary purpose [was] to complete the allocation of federal lands in the State of Alaska."). In ANILCA's statement of purpose Congress declares as a goal to "preserve wilderness resource values and related recreational opportunities[.]" 16 U.S.C. § 3101(b). Conservation is another goal: "It is the intent of Congress in this Act . . . to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation[.]" *Id.*

Finally, Congress was also aware of the need to safeguard State and Native lands located within conservation system units or CSUs. Thus, Congress wanted to ensure that federal agencies would not use

their new powers to stifle economic development on lands conveyed to the State in the Statehood Act, and Native Corporations in ANCSA. *See Sturgeon*, 136 S. Ct. at 1066; *City of Angoon v. Marsh*, 749 F.2d 1413, 1417 (9th Cir. 1984) ("the drafters of ANILCA never intended the mere location of boundary lines on maps delineating the overall conservation system to indicate that private lands conveyed to Native Corporations were to be treated as public lands").

The Battle Over State and Federal Management of Subsistence Rights

Title VIII of ANILCA required that rural Alaska residents be accorded a priority for subsistence hunting and fishing on public lands. 16 U.S.C. §§ 3113, 3114. Pursuant to § 805(d) of ANILCA, Congress gave the State authority to implement the rural subsistence preference by enacting laws of general applicability consistent with ANILCA's operative provisions. In anticipation of ANILCA's passage, the State enacted laws consistent with Title VIII which gave rural residents a subsistence priority. In 1982, after Congress enacted ANILCA, the Secretary of the Interior certified the State to manage subsistence hunting and fishing on public lands.

Once the State began managing for subsistence, Alaskans spent years fighting over the subsistence preference.[12] In *Native Village of Quinhagak v. United*

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[12] *See, e.g., Madison v. Alaska Dep't of Fish & Game*, 696 P.2d 168 (Alaska 1985); *Amoco Production Co. v. Village of Gambell*,

States, 35 F.3d 388 (9th Cir. 1994), tribes filed suit challenging the State's decision to prohibit subsistence fishing in and around subsistence fishing villages. Under the State's regulations, tribal members—in one of the poorest regions in the country—were subject to an absolute ban on taking rainbow trout for subsistence uses and could be prosecuted for subsistence fishing in navigable waters. Meanwhile, the State authorized sport rainbow trout fishers in these same rivers. *Id.* at 390.

The battle reached a new level when, in 1989, the Alaska Supreme Court ruled that Alaska's subsistence program violated the Alaska constitution because, as required by ANILCA, it provided for a rural preference while the Alaska constitution forbids residency requirements. *McDowell v. State*, 785 P.2d 1 (Alaska 1989). The State's inability to comply with ANILCA required the federal government to take over the subsistence program. And, despite repeated efforts throughout the 1990s, the State was never able to come into compliance with ANILCA.[13]

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480 U.S. 531 (1987); *Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312 (9th Cir. 1988); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186 (9th Cir. 2000). *See generally* Case & Voluck, *Alaska Natives and American Laws* 291-310 (collecting cases).

[13] *Alaska Native Subsistence and Fishing Rights*, Committee on Indian Affairs United States Senate, 107th Congress, S. HRG. 107–456 (April 17, 2002) (discussing at length the subsistence battles and the State's inability to comply with ANILCA).

By 1994, it was widely believed that the conflict between equal access to Alaska's fish and game versus preserving the subsistence priority was "likely to continue indefinitely, no matter what courts or legislators may do to resolve the subsistence preference issue." Thomas A. Morehouse and Marybeth Holleman, *When Values Conflict: Accommodating Native Subsistence* 1 (1994).

Perhaps worse, the subsistence wars in the 1980s and 1990s were ugly. Writing in the *Anchorage Times* immediately after *McDowell*, one political activist "compared the Alaska Supreme Court not only to southern segregationist judges of another era but also to George Armstrong Custer." *When Values Conflict: Accommodating Native Subsistence* 4. On the other side of the debate, a former official of the Alaska Department of Fish and Game wrote in the *Anchorage Daily News* in 1990 that he was "not interested . . . in having the equal protection articles of either the U.S. or Alaska's constitution abridged in order to preserve elements of a 'Stone Age culture.'" *When Values Conflict: Accommodating Native Subsistence* 6.

Katie John and the Resolution of the Subsistence Wars

The most significant litigation over subsistence rights involved the State's failure to provide Ahtna shareholders, including Katie John, with an opportunity to pursue their traditional fishing activities at a site known in Athabascan as *Nataelde*, or "Roasted

Salmon Place."[14] In 1985, Katie John filed suit in federal court, seeking enforcement of her subsistence rights.[15] She prevailed.

On appeal, the Ninth Circuit considered the scope of ANILCA's Title VIII in a trilogy of cases between 1995 and 2013. In *Katie John I*, the court grappled with the definition of "public lands" to which the Title VIII subsistence priority applies. 72 F.3d at 701-04. Rejecting the district court's holding that the subsistence priority applies to all Alaskan waters subject to the federal navigational servitude, the Ninth Circuit held that the subsistence priority applies only to "navigable waters in which the United States has reserved water rights." *Id.* at 700. As for identifying the waters in which the United States has reserved water rights, the court held that that task belongs to the federal agencies that administer the subsistence priority. *Id.*

After the district court entered its judgment pursuant to the Ninth Circuit's mandate in *Katie John I*, the judgment was appealed. The Ninth Circuit heard the appeal *en banc* and issued a *per curiam* opinion

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[14] In 1984, Katie John and Doris Charles submitted a proposal to the Alaska State Board of Fisheries requesting that the *Nataelde*, or Batzulnetas, area be opened to subsistence fishing. The proposal was denied.

[15] *Katie John v. State of Alaska*, No. A85-0698-CV (D. Alaska). Congress expressly provided for federal jurisdiction over the State regarding its implementation of ANILCA. ANILCA Section 807(a). Katie John was forced to repeatedly return to court because the State failed to abide by its obligations. For instance, in 1989, Katie John sought preliminary relief from the regulation that limited fishing. Order, June 6, 1989 (No. A85-0698-CV).

affirming the district court's judgment, thereby leaving *Katie John I* in place. *John v. United States*, 247 F.3d 1032 (9th Cir. 2001) (*"Katie John II"*).

In a concurring opinion, three judges argued for a broader definition of "public lands" than that set forth in *Katie John I*. Citing Title VIII's emphasis on subsistence fishing—most of which takes place on navigable waters—the concurrence argued that "Congress clearly established a subsistence priority that applies to all navigable waters in the State of Alaska, not just those waters in which the United States has a reserved water right." *Id.* at 1044 (Tallman, J., concurring). Judge Tallman explained:

> Given the crucial role that navigable waters play in traditional subsistence fishing, it defies common sense to conclude that, when Congress indicated an intent to protect traditional subsistence fishing, it meant only the limited subsistence fishing that occurs in nonnavigable waters. Reading the statute to exclude navigable waters frustrates Congress's express purpose of protecting traditional subsistence fishing for all rural Alaskans by establishing subsistence fishing as a priority use of Alaska's natural resources. We must not interpret federal statutes to negate their own stated purposes. . . . *[W]e cannot presume that Congress intended to protect traditional subsistence fishing with one hand, while reducing it to a veritable nullity with the other.*

Id. at 1036-37 (quotations and citations omitted) (emphasis added).

Following *Katie John I*, the Secretary of the Interior and the Secretary of Agriculture in 1999 issued regulations ("1999 Rules") identifying which navigable waters in Alaska qualify as "public lands" to which Title VIII's subsistence priority applies. *See Katie John III*, 720 F.3d at 1218. Litigation again ensued. A number of environmental and tribal organizations argued that the 1999 Rules fell short by failing to properly designate certain waters for the subsistence priority. *Id.* The State of Alaska argued that the 1999 Rules went too far by applying a subsistence priority to waters that are not "public lands." *Id.* Applying the reserved water rights doctrine set forth in *Katie John I* and preserved in *Katie John II*, the Ninth Circuit rejected both sets of arguments and held that the federal agencies had properly designated each of the waters at issue. *Id.* at 1245.

After *Katie John*, the subsistence wars largely subsided. A fragile equilibrium was finally established among the United States, the State of Alaska, and Alaska Natives regarding the scope of Title VIII's subsistence priority. Decades of turmoil and uncertainty have been replaced with some stability. And because the instant suit does not involve Title VIII's subsistence priority, there is no basis for disrupting this equilibrium. *See Katie John I*, 72 F.3d at 702 n.9 (limiting its holding to those portions of ANILCA "necessary to give meaning to [ANILCA's] purpose of providing an opportunity for a subsistence way of life"); State Brief at 17 n.3 ("Alaska supports the subsistence regulations.").

ARGUMENT

The Ninth Circuit's decision to justify the NPS's regulatory authority—using a doctrine established specifically to interpret and apply ANILCA's Title VIII subsistence priority—pulled subsistence interests and the fragile equilibrium crafted by the *Katie John* trilogy into the present case. Thus, this Court's decision will have broad implications not only for the scope of federal authority within CSUs, but for the Alaska Natives who depend on the subsistence priority for their livelihoods.

Alaskans endured over twenty years of bitter acrimony before achieving the relative calm on subsistence rights made possible by the *Katie John* decisions. If those decisions are disturbed, Alaskans will be forced to relitigate the ugly subsistence wars of the 1980s and 1990s.

A. ANILCA Struck a Balance Between Competing Interests.

In ANILCA, Congress struck a balance between three competing concerns: (i) conserving large land areas; (ii) vindicating the promises the federal government made in the Statehood Act and ANCSA to enable the State and Alaska Natives to manage, control, and use their lands within CSUs; and (iii) preserving a subsistence priority for rural Alaskans. These goals are in tension, and there has been substantial litigation to define the scope of the second two goals with respect to the first.

Despite ANCSA's clear intent that the land conveyed to Alaska Native corporations should be used for economic development, Native corporations were nonetheless forced to litigate to defend their ability to put their inholdings within CSUs to economic use. In *City of Angoon v. Marsh*, the Ninth Circuit rejected an attempt by environmentalists to block a Native corporation from harvesting timber on its lands within a National Forest Monument included in one of the CSUs. 749 F.2d 1413 (1984). Shee Atika, the Native corporation seeking to exercise its timber rights in that case, obtained the land at issue under ANCSA "in order to settle and extinguish their aboriginal claims with certainty and in conformity with the real economic and social needs of the Natives." *Id.* at 1418. Notwithstanding ANILCA's general prohibition on logging within National Forest Monuments, the court explained that, given the "stated purpose" of ANCSA's land conveyance to Shee Atika, "it is inconceivable that Congress would have extinguished their aboriginal claims and insured their economic wellbeing by forbidding the only real economic use of the lands so conveyed." *Id.* The Court concluded that when the pertinent sections of ANILCA are read "harmoniously," "it becomes clear that Congress intended that the private status of the lands conveyed to Shee Atika is to remain unaffected by their inclusion within the exterior boundaries of the conservation system unit." *Id.*

Alaska Natives have had to fight even harder to defend their subsistence rights. In addition to the *Katie John* trilogy discussed above, Native groups were

forced to litigate frequently to protect their customary and traditional way of life. *See, e.g.*, *Ninilchik Traditional Council*, 227 F.3d at 1193 (holding that rural subsistence users must be given a "meaningful use preference"); *Kenaitze Indian Tribe*, 860 F.2d at 318 (holding that Alaska's definition of "rural" violated ANILCA's subsistence preference).

As evidenced by the extensive litigation ANILCA has spawned, the balance Congress struck in ANILCA is difficult to manage. Nevertheless, when the provisions of ANILCA are properly understood and harmonized, all three of ANILCA's goals can be achieved. To wit, the Act balances federal authority and economic development by providing federal land managers with regulatory authority over public lands—lands to which the federal government has title—and cannot use this authority to interfere with activities on State or Native corporation lands. In 1984 the Ninth Circuit recognized and explained this limitation on federal authority: "section 103(c) was added to ANILCA . . . for the express purpose of specifying that only public lands (and not State owned or private lands) are to be subject to the conservation system unit regulations applying to public lands and to make clear that other particular provisions of the bill apply only to public lands." *Angoon*, 749 F.2d at 1417 (quotations omitted)).

Yet the balance between federal authority and economic development must also accommodate subsistence. Consistent with the State of Alaska's sovereign rights, Congress intended that the State manage the

subsistence preference and established standards in Title VIII that the State must achieve to take on the responsibility. When the State could not comply, federal land managers properly assumed the authority, which in turn diminished State authority over fish and game. And, in *Katie John I*, the Ninth Circuit clarified that federal authority to enforce the subsistence priority extended to some navigable waters. This was necessary, as the Ninth Circuit recognized, because the subsistence priority would be effectively meaningless if it did not apply to fishing in navigable streams, 72 F.3d at 702, given that (i) "ANILCA's language and legislative history . . . clearly indicate that subsistence uses include fishing" (16 U.S.C. § 3113) and (ii) subsistence fishing has traditionally taken place in navigable waters. *Id.* Accordingly, there can be no debate that federal management authority over navigable waters must extend as far as necessary to effectuate the subsistence preference in Title VIII.

B. The *Katie John* Doctrine Effectuates the ANILCA Balance and Should Not Be Disturbed.

1. No Party Seeks to Overturn *Katie John* and its Progeny.

Critically, no party to the instant litigation seeks to overturn the *Katie John* trilogy. The Federal Respondents, of course, maintain that it is good law that supports the NPS's broader regulatory authority. Br. in Opp. 16. Sturgeon explains, however, that *Katie John* and its progeny are specific to Title VIII, a title not

implicated by the NPS's hovercraft ban, and one with markedly different statutory authority. *See* Sturgeon Br. at 19, 44. Thus, because it is not at issue in this appeal, any decision by this Court should leave undisturbed the subsistence priority established by the *Katie John* decisions.

2. The *Katie John* Doctrine is Restricted to ANILCA's Subsistence Preference.

The *Katie John* cases were specifically restricted to interpreting the application of the Title VIII rural subsistence priority. *See Katie John I*, 72 F.3d at 700 ("Specifically, the parties dispute whether navigable waters fall within the statutory definition of public lands and are thus subject to federal management *to implement ANILCA's subsistence priority.*") (emphasis added); *Katie John II*, 247 F.3d at 1035-37; *Katie John III*, 720 F.3d at 1218. They did not address the extent of federal control over navigable waters for purposes separate from the subsistence priority. Thus, if this Court reverses the Ninth Circuit's decision on appeal, it need not vacate the *Katie John* decisions—the holding in *Katie John* has not been challenged and the underlying rationale for the decisions should be left in place.

3. ANILCA's Use of "Public Lands" Was Employed in Different Parts of the Act with Different Intent.

The Ninth Circuit reasoned in the decision on appeal that "ANILCA's definition of 'public lands' applies throughout the statute" and found that it would be "anomalous" to treat the definition of "public lands" used in the *Katie John* decisions as using a "different construction of 'public lands' than applicable elsewhere in ANILCA." Pet.App.13a.

What the Ninth Circuit failed to consider, however, is that the provision of ANILCA interpreted in the *Katie John* decisions stands apart from the rest of ANILCA. As noted by Sturgeon (Pet. Br. 43-44), Congress invoked its Commerce Clause authority *only* for Title VIII. 16 U.S.C. § 3111(4). This separate and distinct constitutional authority should have prompted the Ninth Circuit to examine why Congress intended to exercise its authority over navigable waters only in Title VIII (but not to effectuate the other goals of the Act), and whether it was proper to leverage the subsistence authority to justify broader federal control.

Moreover, because ANILCA "is far from a *chef d'oeuvre* of legislative draftsmanship" no court should presume that "identical words used in different parts of the same statute are intended to have the same meaning[.]" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441-42 (2014). This Court has recognized that this presumption "readily yields to context, and a statutory term—even one defined in the statute—may

take on distinct characteristics from association with distinct statutory objects calling for different implementation strategies." *Id.* at 2441 (quotations omitted). After all—

> Although we presume that the same term has the same meaning when it occurs here and there in a single statute. . . . We also understand that most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Thus, the natural presumption that identical words used in different parts of the same act are intended to have the same meaning is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies. The point is the same even when the terms share a common statutory definition. . . .

Environmental Defense v. Duke Energy Corporation, 549 U.S. 561, 574 (2007) (quotations and citations omitted).

Put simply, courts "must do [their] best, bearing in mind the 'fundamental canon of statutory construction that the words of a statute must be read in their

context and with a view to their place in the overall statutory scheme.'" *Util. Air Regulatory Group*, 134 S. Ct. at 2441 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

For example, in *King v. Burwell*, 135 S. Ct. 2480 (2015), this Court held that tax credits are available in each state regardless of whether the state creates its own insurance exchange or has a federal exchange. Notably, a straightforward reading of the critical text pointed toward a conclusion that the credits are available only for state exchanges. As Justice Scalia explained in his dissent: "The Court holds that when the Patient Protection and Affordable Care Act says 'Exchange established by the State' it means 'Exchange established by the State or the Federal Government.'" *Id.* at 2496. Although Justice Scalia viewed this outcome as "quite absurd," *id.*, the majority relied on "the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *id.* at 2492 (emphasis added). After concluding that the phrase "[e]xchange established by the State" was ambiguous, the Court "turn[ed] to the broader structure of the Act." Because limiting tax credits to state exchanges "would destabilize the individual insurance market in any State with a Federal Exchange"—which would run counter to the ACA's purpose—the Court held that tax credits are available for both state and federal exchanges. *Id.*

Similarly, the title-based definition of "public lands" applicable elsewhere in ANILCA must yield to Title VIII's unequivocal purpose of codifying the

promises made to Alaska Natives that their customary and traditional way of life would be protected in exchange for the elimination of their aboriginal hunting and fishing rights.[16] Applying a consistent definition of "public lands" would render an entire section of ANILCA effectively meaningless. *Katie John I*, 72 F.3d at 704 ("If we were to adopt the state's position, that public lands exclude navigable waters, we would give meaning to the term 'title' in the definition of the phrase 'public lands.' But we would undermine congressional intent to protect and provide the opportunity for subsistence fishing."); *Katie John II*, 247 F.3d at 1036 (reading "public lands" in Title VIII "to exclude navigable waters frustrates Congress's express purpose of protecting traditional subsistence fishing for all rural Alaskans") (Tallman, J., concurring).

Finally, even if the term "public lands" is interpreted the same way throughout the Act, it does not follow that federal general regulatory authority should be co-extensive with federal authority to enforce the subsistence priority. Given Congress's clear desire to protect subsistence rights and the obvious reality that the protection would be substantially diminished if federal land managers did not have the authority to

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[16] The entire purpose of Title VIII is to protect the subsistence preference. "[T]he continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is *essential to Native* physical, economic, traditional, and *cultural existence*. . . ." 16 U.S.C. § 3111(1) (emphasis added); *Ninilchik Traditional Council*, 227 F.3d at 1192 ("As is evident throughout ANILCA, Congress places great emphasis on providing rural residents of Alaska with the opportunity to maintain a subsistence way of life.").

enforce the subsistence priority in navigable waters, it is reasonable to interpret federal authority to achieve that end, as the Ninth Circuit did in the *Katie John* decisions. However, the same concerns about preserving federal control over navigable waters are not present in other sections of ANILCA. To the contrary, the legislative history clearly demonstrates that Section 103(a) was added specifically to preserve State, Native, and private control over lands within areas included in CSUs. The decision on appeal failed to address the clear differences in Congress's intentions for federal regulation of navigable waters vis-à-vis the subsistence priority as opposed to the conservation goals within the broadly defined CSUs. This failure is a critical error because, by invoking the *Katie John* doctrine without addressing these significant differences in statutory context, the Ninth Circuit did not give effect to the most important purpose of ANILCA—the careful balance it crafted among competing goals.

CONCLUSION

Consistent with ANILCA's goal of balancing competing interests, Ahtna urges the Court to be mindful of the impacts a decision adjudicating the conservation and sovereign interests raised below would have on Congress's undisputed goal of protecting Ahtna shareholders' subsistence priority. A decision that eliminated all federal control over navigable waters—without recognizing Congress's special attention to meaningfully preserving Native customary and traditional

ways of life—would defeat the plain purposes of ANCSA and ANILCA and plunge Alaska back into the subsistence wars.

Respectfully submitted,

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No. 17-949

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Alaska Native tribes, organizations and subsistence users who support federal jurisdiction to regulate waters in Alaska Conservation System Units ("CSUs") to protect the subsistence fishing way of life upon which rural Alaska Native people vitally depend. Indeed, without federal regulation of navigable waters within CSUs, the fishing rights Congress expressly protected in Title VIII of the 1980 Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3111-3126, would become a nullity; and "[i]f [Alaska Natives'] right to fish is destroyed, so too is their traditional way of life." *United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991).

Amici agree with the government that Congress granted to the National Park Service ("NPS") authority to "promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States" in the 1976 amendment to the National Park Service Organic Act. Pub. L. No. 94-458, 90 Stat. 1939, amending the Act of August 25, 1916, Pub. L. No. 64-235, 39 Stat. 535 ("Organic Act"). Under this authority, the United States has long regulated waterways in National Parks, including promulgating the hovercraft regulation at issue here.

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[1] Pursuant to Supreme Court Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici* and their counsel made any monetary contribution toward the preparation and submission of this brief. Petitioner filed a blanket consent with this Court, and the United States provided its consent.

Congress expressly made the Organic Act applicable to all CSUs created or expanded in ANILCA, including the Yukon-Charley Rivers National Preserve. ANILCA section 203, 16 U.S.C. § 410hh-2. It did not withdraw that express delegation of regulatory authority when it enacted section 103(c) of ANILCA, which provides that Alaska state lands and Native Corporation lands within CSUs are exempt from certain federal regulation. 16 U.S.C. § 3103(c). Nothing in this provision calls into question NPS's preexisting authority to regulate the water column of the Nation River or other navigable "waters located within areas of the National Park System." These waters are not exempted from Park Service jurisdiction by the limitations set forth in section 103(c).

Moreover, Congress sought to achieve numerous purposes in enacting other provisions of ANILCA, including supporting subsistence fishing and hunting and protecting bodies of water and their fish and marine mammal populations. Petitioner's interpretation would undermine or nullify a number of those clear purposes and provisions. While petitioner and *amicus* State of Alaska disclaim any intent to displace federal protection and management of subsistence fishing on rivers within CSUs, the sweeping nature of their legal theories would directly jeopardize protective federal regulations that have been in place since 1999.

Over the past two decades, *amici* and other tribes and tribal organizations have engaged in litigation to secure their federally protected subsistence fishing rights on navigable waters in Alaska—rights embodied in these federal regulations. In the long-running "*Katie John*" litigation, the courts upheld the

federal determination—made after notice and comment rulemaking—that certain navigable waters within CSUs and national forests are "public lands" within the meaning of Title VIII of ANILCA, 16 U.S.C. §§ 3111-3126. *See Alaska v. Babbitt* (*"Katie John I"*), 72 F.3d 698 (9th Cir. 1995), *cert. denied*, 516 U.S. 1036, and 517 U.S. 1187 (1996); *John v. United States* (*"Katie John II"*), 247 F.3d 1032 (9th Cir. 2001) (en banc) (per curiam); and *John v. United States* (*"Katie John III"*), 720 F.3d 1214, 1225 (9th Cir. 2013), *cert. denied sub nom. Alaska v. Jewell*, 572 U.S. 1042 (2014) (collectively, "*Katie John* litigation"). The courts deferred to the Secretary of the Interior's determination that the definition of "public lands" in ANILCA includes navigable waters in which the United States owns federally reserved water rights, and further concluded that this interpretation is necessary to carry out Congress's purposes in establishing the CSUs. Thus, the courts upheld federal subsistence fishing regulations covering those waters. *Katie John III*, 720 F.3d at 1226.

Two of the *amici* here, the Mentasta Traditional Council and the Village of Dot Lake, are federally recognized tribes and are the home Villages of the plaintiffs in the *Katie John* litigation. Nora David is Katie John's daughter and representative of the John family seeking to preserve her mother's legacy. The Kenaitze Indian Tribe and the Organized Village of Saxman are federally recognized tribes that enjoy the protections that Titie VIII accords their traditional subsistence hunting and fishing activities. Most of the tribal members in these villages are both subsistence

users and shareholders in Alaska Native Corporations.[2]

In the *Katie John* litigation, *amici* here and others engaged in a sustained effort to ensure and support the priority for subsistence uses of fish in Title VIII of ANILCA. *See Katie John III*, 720 F.3d at 1218-24 (recounting history of subsistence management). That is their vital interest in this case as well.

SUMMARY OF ARGUMENT

This is not a case about "principles of federalism," Pet. Br. at 22. This is a case involving the interpretation of federal statutes assigning regulatory authority in areas of unquestioned and unquestionable federal power. Nor is this a case about who has "title" to the Nation River. No one owns the water column of a navigable river in a National Park or Preserve. The United States and the States have regulatory authority and interests in aspects of such rivers, including submerged lands, fish and other marine life, navigation and more. Water rights may be established pursuant to state law, or by the United States under the federal reserved water rights doctrine. Where, as here, Congress clearly confers regulatory authority on a federal agency, that regulatory authority trumps conflicting state regulations in the same arena. This Court should reject petitioner's effort to convert an exercise in statutory interpretation into a referendum

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[2] Additional *amici* are the Tanana Chiefs Conference and Chugachmuit, two Alaska Native inter-tribal consortia which together represent 49 tribal villages located in the Interior and Prince William Sound regions of Alaska. *Amicus* Alaska Federation of Natives was organized in 1966 and is the largest statewide Native organization formed to protect Alaska Native lands and hunting and fishing rights.

on States' rights, and affirm the decision below for three reasons.

First, Congress expressly delegated authority to regulate navigable waters in the National Park system to the Secretary of the Interior in the Organic Act. And in section 203 of ANILCA Congress expressly directed that the Secretary "shall administer the lands, waters, and interests therein" within the Alaska Parks and Preserves "as new areas of the National Park System" under the Organic Act. 16 U.S.C. § 410hh-2.

Section 103(c) of ANILCA—a provision added to the statute at the last minute in a section entitled "Maps"—did not in any way eliminate the Secretary's long-held authority acknowledged in section 203. Indeed, section 103(c) only addresses Park Service regulation of State, Native and private lands within park boundaries, but does not control the regulation of navigable waters, which were not conveyed to any of these parties.

Second, assuming for argument only that section 103(c) of ANILCA limits the Secretary's regulatory authority to "public lands" within Alaska National Parks and Preserves, navigable waters still constitute "public lands" as defined in the Act. "Public lands" include waters where the United States has title to "interests therein," as it unquestionably does with respect to "navigable" waters. Specifically, the federal government holds title to an interest in such waters (including interests in the Nation River flowing through the Yukon-Charley Rivers National Preserve) under the doctrine of reserved water rights. If there were doubt on this score, the Secretary has so interpreted ANILCA in regulations issued pursuant to notice and comment rulemaking, and Congress has

ratified the Secretary's regulatory determinations. Part II.

Third, numerous provisions of ANILCA addressing Congress's purpose to protect and preserve the waters of newly created Alaska National Parks and Preserves and the subsistence way of life in these areas make no sense if the Secretary lacks authority to regulate navigable waters within those Parks and Preserves. As this Court noted in *Sturgeon v. Frost*, "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." 136 S.Ct. 1061, 1070 (2016) (*quoting Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 101 (2012)). Part III.

ARGUMENT

I. CONGRESS IN THE ORGANIC ACT AND IN ANILCA AUTHORIZED THE SECRETARY OF THE INTERIOR TO REGULATE NAVIGABLE WATERS WITHIN NATIONAL PARKS AND PRESERVES, INCLUDING IN ALASKA.

Congress indisputably enjoys the constitutional power to authorize the Secretary of the Interior to regulate navigable waters of the United States within National Parks and Preserves, and it did so through the 1976 amendments to the Park Service Organic Act. Congress acknowledged the exercise of that power in section 203 of ANILCA, 16 U.S.C. § 410hh-2. Congress did not then surreptitiously curtail that authority in section 103(c) of ANILCA, 16 U.S.C. § 3103(c), entitled "Maps," which protects Alaska Native corporation and State inholdings from some Park Service regulations within CSUs. *Amici* agree with the government that

the decision below can be affirmed on this ground alone.

Because Congress's powers over navigable waters under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Property Clause, U.S. Const. art. IV, § 3, cl. 2, are extremely broad, there is no doubt that federal legislative and regulatory authority extends to navigable waters within national parks and preserves. Indeed, the United States has "paramount power" over all navigable waters in the Nation. *PPL Mont. LLC v. Montana*, 565 U.S. 576, 591 (2012) (citations omitted). Thus, navigable waters are subject to the jurisdiction of the United States. *United States v. Rands*, 389 U.S. 121, 123 (1967); A. Dan Tarlock, *Law of Water Rights and Resources* § 9.6 (2018) ("Federal jurisdiction over waters now extends to all activities subject to the full Commerce Clause[.]").

A. Congress Authorized The Secretary To Regulate Activities On Navigable Waters, And ANILCA Expressly Incorporated That Power For CSUs In Alaska.

In a 1976 amendment to the National Park Service Organic Act, Congress authorized the Secretary of the Interior to regulate waters within the National Park System. Specifically, that law provides that "[t]he Secretary, under such terms and conditions as the Secretary considers advisable, may prescribe regulations . . . concerning boating and other activities on or relating to water located within System units, *including water subject to the jurisdiction of the United States*." 54 U.S.C. § 100751(b) (emphasis added). Exercising the Secretary's authority under the 1976 amendment, as well as the 1916 Organic Act, the Park Service promulgated the regulation at issue here. That

regulation states, "[t]he operation or use of hovercraft [in National Parks] is prohibited." 36 C.F.R. § 2.17(e).

All parties agree that the Nation River is a navigable river for purposes of federal law, and that this Park Service regulation applies to boating on the River. The Organic Act as amended constitutes a clear statement of the United States' power to regulate navigable waters in National Parks and Preserves, and grants the Park Service authority to exercise that regulatory power.

In section 203 of ANILCA, Congress reiterated the Secretary's clear authority to regulate these waters, commanding that the Secretary "shall administer the lands, waters, and interests therein" within the Alaska Parks and Preserves (including the Yukon-Charley Preserve) "as new areas of the National Park System" under the Organic Act. 16 U.S.C. § 410hh-2 ("the Secretary shall administer the lands, waters, and interests therein added to existing areas or established by the foregoing sections of this subchapter as new areas of the National Park System, pursuant to the provisions of the Act of August 25, 1916 (39 Stat. 535), as amended and supplemented (16 U.S.C. § 1 *et seq.*)."). *See also* H.R. Rep. No. 96-97 at 171 (1979) ("The Yukon-Charley Rivers National Preserve . . . should be managed *in the same manner as a national park*, except that hunting and trapping shall be allowed.") (emphasis added); S. Rep. No. 96-413 at 162 (1979) (same).

B. ANILCA Did Not Strip The Secretary Of The Power To Regulate Navigable Waters In CSUs.

The question presented, accordingly, is not whether section 103(c) of ANILCA contains an express

statement of the United States' authority to regulate the Nation River. Instead, it is whether section 103(c) clawed back some of the United States' clear power. It did not. Section 103(c) is part of a section of ANILCA called "Maps," and entitled "Lands included within unit; acquisition of land by Secretary." It provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as defined in the Act) shall be deemed included in the unit. No lands which before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.

16 U.S.C. § 3103(c). This section does not withdraw the Secretary's express authority under the Organic Act and section 203 of ANILCA to regulate navigable waters within CSUs in Alaska. As pointed out by the United States, section 103(c) was characterized by its sponsors as a technical amendment without substantive effect on federal authority to protect and regulate activities on or related to navigable waters. U.S. Br. at 26-30; 40-50.

In arguing the contrary, petitioner first focuses on the second sentence of this section, which protects State-owned, Native Corporation-owned and privately owned "lands" in CSUs in Alaska from certain federal regulation. But navigable waters are not lands which were conveyed to the State, Native Corporations or private persons; thus, this section does not restrict the Secretary's authority under the Organic Act and section 203 to regulate navigable waters within CSUs.

Indeed, contrary to the *amicus* State's view, State Br. at 16, navigable waters within the Yukon-Charley

Rivers National Preserve (such as the Nation River) and other CSUs are not "owned" by the State and were never "conveyed" to the State. States do not hold title to navigable waters, though they generally hold "title to and ownership of the lands *beneath* navigable waters." 43 U.S.C. § 1311(a) (emphasis added).[3] As Justice Scalia explained in *Alaska v. United States*, 545 U.S. 75 (2005), state ownership of submerged lands does not diminish federal authority to regulate activities in navigable waters:

> If title to submerged lands passed to Alaska, the Federal Government would still retain significant authority to regulate activities in the waters of Glacier Bay by virtue of its dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power. *See, e.g.*, 43 U.S.C. § 1314(a) (under the Submerged Lands Act, the United States retains "powers of regulation and control of . . . navigable waters for the constitutional purposes of commerce [and] navigation"); . . . *United States v. California*, 436 U.S. 32, 41, and n. 18 (1978) (noting that the

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[3] The State relies on the Submerged Lands Act ("SLA"), 43 U.S.C. §§ 1301-1315, in support of its argument that it "owns" the Nation River and other navigable waters and therefore that these waters are not subject to federal regulation. Congress enacted the SLA in 1953 to reverse this Court's decisions holding that the United States, and not the States, holds title to the beds underlying the marginal sea. *See* Robin Kundis Craig, *Treating Offshore Submerged Lands As Public Lands: A Historical Perspective*, 34 Pub. Land & Resources L. Rev. 51, 69-70 (2013) (footnotes omitted). In the SLA, Congress recognized state ownership of submerged lands, but not of any water. *See* 43 U.S.C. § 1311(a)(1) (confirming title and ownership of "the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters," but not title to the waters themselves).

> United States retained "its navigational servitude" even when California took the "proprietary and administrative interests" in submerged lands surrounding islands in a national monument). . . . It is thus unsurprising that States own submerged lands in other federal water parks, such as the California Coastal National Monument and the Boundary Waters Canoe Area in Minnesota.

Id. at 116-18 (Scalia, J., concurring in part and dissenting in part) (footnote omitted); *see also Rands*, 389 U.S. at 127 (the SLA "left congressional power over commerce . . . precisely where it found [it]"); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426-27 (1940) ("The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government.").[4]

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[4] With ownership of submerged lands, the States acquired some authority to regulate associated waters, *see* 43 U.S.C. § 1311(a)(2), absent preemptive federal regulation of navigable waters. *See United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 706-707 (1899). However, the States do not "own" the water column or displace federal authority to regulate by virtue of having such regulatory authority. *See* Thompson, Leshy, Abrams & Zellmer, *Legal Control of Water Resources* 591 (6th ed. 2018) ("[T]he most distinctive legal feature of water is its status as a public resource that cannot be privatized in the ordinary way."). Whatever the extent of the State's power, it is subject to "the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *PPL Mont.*, 565 U.S. at 591 (*quoting United States v. Oregon*, 295 U.S. 1, 14 (1935) (additional citations omitted)); *see also* 43 U.S.C. § 1314(a) (under the SLA, the United States retains "powers of regulation and control of . . . navigable waters for the constitutional purposes of commerce [and] navigation").

In fact, although the United States has jurisdiction over all navigable waters and the Park Service has express authority to regulate navigable waters within National Parks and Preserves, "[n]either sovereign nor subject can acquire anything more than a mere usufructuary right" in navigable waters. *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954); *see also United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913) ("Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."); *United States v. Twin City Power Co.*, 350 U.S. 222, 226 (1956) (federal navigational servitude can preempt any use rights granted by a State to a private party, so that compensation under the Fifth Amendment is not required for taking such interests).

The conveyance of "lands" within CSUs to the State, Native Corporations, and private owners does not convey ownership of the associated navigable waters and thus does not alter the United States' authority, exercised in the Organic Act and section 203 of ANILCA, to regulate those waters. Petitioner relies on the first sentence of section 103(c), which defines the lands within CSUs that are "public lands." ANILCA defines "public lands" as "lands, waters, and interests therein" to which the United States holds title. 16 U.S.C. § 3102(1)-(3). That definition of "public lands" does not purport to alter the Secretary's pre-existing authority to regulate "boating or other activities on or relating to water located within [National Park] System units, including water subject to the jurisdiction of the United States," 54 U.S.C. § 100751(b), all as incorporated into ANILCA in section 203. The Secretary's power reaches all

activities on National Park System waters, and expressly includes waters subject to U.S. jurisdiction, a category that embraces navigable waters.

What this means is that section 203 of ANILCA explicitly recognizes the Secretary's regulatory authority conferred by the Organic Act. 16 U.S.C. § 410hh-2. That authority is subject to a proviso that protects hunting in certain areas and "[s]ubsistence uses by local residents . . . in national preserves and, where specifically permitted by this Act, in national monuments and parks." *Id.* But, critically, the Secretary's existing regulatory authority over navigable waters in the National Park System is reconfirmed in ANILCA and not otherwise qualified.

In sum, the Nation River is not private property, nor is it owned by the State of Alaska. It constitutes navigable water within a National Park or Preserve. Congress indisputably has constitutional authority to regulate such waters. By the Organic Act, it delegated that authority to the Secretary of the Interior and the National Park Service, which promulgated the regulation at issue here. Section 203 expressly acknowledges the Secretary's delegated authority to regulate navigable waters within the CSUs of Alaska, and section 103(c) does not rescind it.[5]

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[5] To be sure, Congress in ANILCA provided a modified regime for National Park Service administration in Alaska. As the Court noted in *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070-72 (2016), many of these exceptions are directed to access and fishing regulation. For instance, section 811(b), 16 U.S.C. § 3121(b), requires the Secretary to provide for reasonable "motorboat[]" access to subsistence users, and section 1110(a), 16 U.S.C. § 3170(a), makes an exception for "snowmachines" on "frozen river[s]" and for "motorboat[]" uses to the extent necessary for "traditional activities" and "for travel to and from villages and homesites." The Park Service is required to develop a management plan that

II. FEDERAL RESERVED WATERS ARE INTERESTS IN LANDS WITHIN THE MEANING OF ANILCA'S PUBLIC LANDS DEFINITION.

Even assuming—contrary to Part I—that section 103 of ANILCA limits the Secretary's authority to regulate navigable waters only to "public lands," that requirement is satisfied in this case. "The term 'public lands' means lands situated in Alaska which . . . are Federal lands, except [State and Native corporation selected lands]." 16 U.S.C. § 3102(1). "Federal lands" means lands whose "title . . . is in the United States," and "land" means "lands, waters, and *interests therein*." 16 U.S.C. § 3102(1)-(3) (emphasis added). The United States has a proprietary interest in the navigable waters of Alaska's CSUs that fully supports its regulation of the uses of those waters.

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includes "[a] description of the programs and methods that will be employed to manage fish and wildlife resources and habitats . . . [.]" Section 1301(b)(2), 16 U.S.C. § 3191(b)(2). Section 1310, 16 U.S.C. § 3199, provides for the maintenance and construction of navigation aids on waters within CSUs. Section 1313, 16 U.S.C. § 3201, provides for the administration of Preserves (including the Yukon-Charley Rivers National Preserve) and contains a directive that "the taking of fish and wildlife for sport purposes and subsistence uses, and trapping shall be allowed in a national preserve under applicable State and Federal law and regulation." And of course, Title VIII provides a priority for subsistence fishing—which takes place in navigable waters. Section, 804, 16 U.S.C. § 3114. These exceptions and mandates would be wholly unnecessary if the Secretary lacked general jurisdiction under section 203 and the Organic Act to regulate uses of navigable waters within CSUs. *See* U.S. Br. at 40-50.

A. The United States Holds An Interest In Navigable Waters Within The Meaning Of ANILCA Section 102.

The United States has a reserved interest in waters associated with federal land reservations to the extent necessary to achieve the purposes for which Congress reserved the lands, commonly known as the reserved water rights doctrine. *See Cappaert v. United States*, 426 U.S. 128, 138 (1976); *see also United States v. New Mexico*, 438 U.S. 696, 707-11 (1978). As the Court has explained, federal reserved rights to water are established "when the Federal government withdraws its land from the public domain and reserves it for a federal purpose, [and] the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert*, 426 U.S. at 138. There is "no doubt about the power of the United States under [the Commerce Clause and the Property Clause] to reserve water rights for its reservations and its property." *Arizona v. California*, 373 U.S. 546, 598 (1963). And such reservations may be made before or after statehood. *Id.* at 597-98.

Contrary to petitioner's argument (Pet. Br. at 36), water rights have consistently been recognized as property interests subject to ownership and as such are interests in waters, title to which is in the United States. Although usufructuary in nature, water rights constitute real property that may be bought and sold, assigned, mortgaged, and leased, and may not be taken by the government without payment of just compensation. *See Dugan v. Rank*, 372 U.S. 609, 625-26 (1963) (when the Government subordinated the respondents' water rights to a federal project there was an appropriation of property for which

compensation should be made); *Fed. Power Comm'n v. Niagara Mohawk Power Co.*, 347 U.S. 239, 251-52 (1954) ("The [Federal Water Power] Act treats usufructuary water rights like other property rights. While leaving the way open for the exercise of the federal servitude and of federal rights of purchase or condemnation, there is no purpose expressed to seize, abolish or eliminate water rights without compensation merely by force of the Act itself."); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 754-755 (1950) (construction of Friant Dam resulted in taking of riparian rights to seasonable flood waters); *Klamath Irrigation Dist. v. United States*, 227 P.3d 1145, 1161 (Or. 2010) (en banc) ("Oregon has recognized and continues to recognize that persons who put water to beneficial use can acquire an equitable or beneficial property interest in a water right to which someone else holds legal title."). *See also* Tarlock, *supra* § 9:32 (collecting cases).[6]

Petitioner and the State denigrate usufructuary water rights as "far less than title," State's Br. at 28; *see* Pet. Br. at 27-28, and claim that ANILCA requires something more than an "interest" in water. But as used in ANILCA, the term "title" is not limited to property subject to a deed of conveyance. The sheer volume of takings litigation involving interference

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[6] Federal reserved water rights can protect out-of-stream consumptive uses, or more often, the right to maintain water levels or river flows at a certain level. *See Cappaert*, 426 U.S. at 138, 141 (recognizing federal reserved water right to protect fish habitat in pool in Devil's Hole National Monument); *United States v. Adair*, 723 F.2d 1394, 1415 (9th Cir. 1983) (reserved waters for protection of fish habitat in upper Klamath Lake and Marsh); *Potlach Corp. v. United States*, 12 P.3d 1256, 1258 (Idaho 2000) (water reserved to protect river levels under Wild & Scenic Rivers Act).

with these "usufructuary rights" in water in both state and federal courts demonstrates their importance in our property scheme. The holder of a water right under state or federal law has important ownership interests protected by state and federal constitutions.

Equally to the point, the interpretation offered by petitioner and the State—resting on a narrow interpretation of the word "title"—would read the phrase "waters and interests therein" out of the statute. Doing so would conflict with the cardinal rule that courts should give effect to every word of a statute and presume that Congress meant what it said. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Indeed, in interpreting another provision of ANILCA, this Court has noted that federal "title" interests in land or water should *not* be construed in a narrow fashion. In *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 n.15 (1987), the government argued that section 810 of ANILCA, 16 U.S.C. § 3120, did not apply to the Outer Continental Shelf ("OCS") because the United States did not hold title to the OCS or its mineral resources. This Court rejected the argument:

> The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States."

Amoco, 480 U.S. at 548 n.15. Similarly here, petitioner's claim that the United States does not have

"title" to an "interest" in the navigable waters of Alaska CSUs takes an artificially narrow view of the definition of public lands in ANILCA, and is based on a misunderstanding of the reserved water rights doctrine and the nature of property interests in water. Pet. Br. at 27; State's Br. at 4, 22-24.

Accordingly, the United States owns an "interest" in the navigable waters within Alaska's CSUs under the reserved water rights doctrine; those waters are therefore "public lands" within the meaning of ANILCA to the extent of that interest; and the Secretary has authority to regulate those waters.

B. The Secretary's Interpretation Of Section 103 Of ANILCA Is Entitled To Deference On Its Own Terms And Has Been Ratified By Congress.

Even if ANILCA's definition of "public lands" were deemed ambiguous in this respect, that ambiguity would be resolved by longstanding federal regulations interpreting statutory definitions of "public lands" to include waters within CSUs in which the United States has an interest under the reserved water rights doctrine. Moreover, Congress has ratified that regulatory interpretation of ANILCA's "public lands" definition.

As noted above, in enacting ANILCA, Congress directed that the Secretary of the Interior "shall administer the lands, waters and interests therein" under the Organic Act, 16 U.S.C. § 410hh-2, which had delegated to the Park Service the authority to regulate waters within the Park System for the "fundamental purpose" of conserving the scenery, natural objects, and wildlife within their borders, 54 U.S.C. § 100101(a). In addition, in ANILCA Congress stated

its purposes in reserving the areas specified, including safeguarding waters, protecting aquatic wildlife, preserving marine recreation and preserving subsistence use, including fishing. 16 U.S.C. § 3101. Critical to *amici* is the protection Congress afforded subsistence fishing in navigable waters in Title VIII.

To achieve the Act's objective of preserving and supporting subsistence uses, Congress stated in section 804 that on all "public lands" in Alaska the taking of fish and wildlife for subsistence uses "shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. § 3114. ANILCA offered Alaska the option of effectuating that subsistence priority by "enact[ing] and implement[ing] laws of general applicability" consistent with that priority by a date certain. *Id.* § 3115(d).

Thereafter, Alaska implemented a subsistence-use priority for hunting and fishing. However, the Alaska courts invalidated that state priority. *McDowell v. State*, 785 P.2d 1 (Alaska 1989). As a result, the Departments of Interior and Agriculture promulgated temporary regulations that implemented ANILCA's subsistence-use priority on "public lands." *See* Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27,114 (June 29, 1990). The final regulations adopted in 1992 generally excluded navigable waters, except where the United States reserved the submerged lands prior to statehood. *See* Subsistence Management Regulations for Public Lands in Alaska, 57 Fed. Reg. 22,940, 22,942 (May 29, 1992).

The Secretary subsequently determined that "public lands" under ANILCA include the navigable waters in which the United States possesses reserved water rights. The Ninth Circuit agreed and held that "public

lands" as defined in ANILCA include "those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Katie John I*, 72 F.3d at 703-04. *See generally Katie John Litigation*, *supra*.

Once *Katie John I* was decided, the Secretary promulgated permanent regulations explaining that the United States held reserved water rights in the navigable waters within Alaska CSUs, and therefore that these waters constitute "public lands" under ANILCA. 50 C.F.R. § 100.3 (1999); *see* Subsistence Management Regulations for Public Lands in Alaska, 64 Fed. Reg. 1279 (Jan. 8, 1999); *see also* Subsistence Management Regulations for Public Lands in Alaska, 62 Fed. Reg. 66,216, 66,217-218 (Dec. 17, 1997) (proposed rule). Congress specifically delayed the implementation of these regulations on several occasions to give the State an opportunity to amend its laws to allow a subsistence-use priority on public lands and thereby eliminate the need for federal regulations enacting that priority. Omnibus Consolidated and Rescissions Appropriations Act of 1996, Pub. L. No. 104-134, § 336, 110 Stat. 1321 (1996); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 317, 110 Stat. 3009 (1997); Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 316(a), 111 Stat. 1543 (1998). Ultimately, however, the State failed to act.

As a result, Congress instructed that the federal regulations should take effect. *See* Department of the Interior and Related Agencies Appropriations Act, 1999 (1999 Appropriations Act), Pub L. No. 105-277, Div. A, § 101(e), § 339(a)(1) and § 339(b)(2), 112 Stat. 2861, 2681-296 (repealing prior restriction on effective date of regulation); 16 U.S.C. § 3102 note. This

chronology shows that Congress attended to the regulations at issue (including their interpretation of the term "public lands"), understood their meaning, and made a deliberate decision that they should become effective. *See, e.g., N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) ("Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.") (citations and quotation marks omitted); *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (congressional awareness of interpretation of statute is proof of ratification of interpretation). Given the multiple enactments on the subject, "it is hardly conceivable that Congress . . . was not abundantly aware of what was going on." *Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983). Indeed where, as here, Congress acts by "positive legislation" to adopt an existing agency position (as contrasted with merely reenacting a previously construed term), the "administrative construction" is "virtually conclusive." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986).

Twenty-two years ago the Park Service issued new national regulations stating that Park Service rules apply on all navigable waters within the Park System. *See* General Regulations for Areas Administered by the National Park Service and National Park Systems in Alaska, 61 Fed. Reg. 35,133 (July 5, 1996) (36 C.F.R. 1.3(a)(2)) (explaining that the rules would "clarif[y] and interpret[] existing NPS regulatory intent, practices and policies"); *id.* at 35,135 (rejecting Alaska's argument that ANILCA section 103(c)

"preempt[ed] [the National Park Service's] well-established authority on navigable waters" in Alaska National Parks). The Secretary also observed that the State's contrary position would be inconsistent with ANILCA's underlying purposes. *Id.* at 35,135. Subsequent regulations are in accord and have uniformly been upheld by the court of appeals. *See, e.g., John v. United States*, 720 F.3d 1214 (9th Cir. 2013), *cert. denied sub nom. Alaska v. Jewell*, 572 U.S. 1042 (2014).

In sum, for nearly two decades the federal government has treated the identified waters of Alaska CSUs as "public lands" by virtue of the government's reserved water rights (and on that basis has applied Title VIII's subsistence fishing priority to those waters). The federal government has by regulation also treated all navigable waters within Alaska CSUs as subject to the Park Service's authority granted under the 1976 Organic Act amendments. Those twin determinations are entitled to deference. Further, the regulatory chronology and pathway demonstrates that, with respect to the Secretary's understanding of the term "public lands," Congress ratified the Secretary's regulations. That should be the end of the matter.

C. The Attempt To Distinguish The Definition Of "Public Lands" For Subsistence And Other Purposes Is Not Persuasive.

Petitioner and the State proffer the fall-back argument that this Court can rule in petitioner's favor without "disturb[ing]" the federal regulations governing subsistence management approved in the *Katie John Litigation*. State Br. at 29-35; Pet. Br. at 34-35. Specifically, they argue that "public lands"

might mean something different in Title VIII (subsistence) than it does in other ANILCA Titles.

While *amici* support all efforts to recognize and preserve the *Katie John* decisions, we regretfully believe that arguments attempting to distinguish the scope of "public lands" for Title VIII, on the one hand, and the rest of ANILCA, on the other, would undermine the foundation on which the *Katie John* rulings stand. Title I of ANILCA, 16 U.S.C. § 3102, "provides that the definitions apply to the entire Act, except that in Title IX, which provides for implementation of ANCSA and the Alaska Statehood Act, and in Title XIV, which amends ANCSA and related provisions, the terms shall have the same meaning as they have in ANCSA and the Alaska Statehood Act." *Gambell*, 480 U.S. at 546 n.13 (internal citation omitted). There is no separate definition of "public lands" for purposes of Title VIII of ANILCA governing subsistence uses.

Further, when Congress identified its purposes for reserving public lands in ANILCA, *see* 16 U.S.C. §§ 410hh, 3101, it did not differentiate among the multiple purposes it was serving. It expressly identified several purposes for reserving land, including subsistence uses but also the protection of waters, rivers and fish. *Id.* The achievement of *all* these purposes—not just support for subsistence use—requires the reservation of appurtenant waters.

III. PETITIONER'S INTERPRETATION OF ANILCA SECTION 103(C) MAKES NO SENSE WHEN THE FULL STATUTORY CONTEXT IS CONSIDERED.

Amici have shown both that section 103(c) of ANILCA does not suggest any diminution of the

Secretary's authority to regulate navigable waters within CSUs, and that even if the Secretary's regulatory authority in such areas were limited to "public lands," then navigable waters within CSUs are public lands. In either case, however, petitioner's and the State's reading of section 103(c) makes no sense when it is examined in the context of the full statutory scheme in which it is embedded.

First, and most notably, Congress expressed its four objectives plainly:

- To preserve "lands and waters" protected by ANILCA "for the benefit, use, education, and inspiration of present and future generations," based on their scenic, geological and wildlife values. 16 U.S.C. § 3101(a).
- To protect the designated areas' "natural landscapes," wildlife "resources related to subsistence needs," "rivers[] and lands," and "recreational opportunities," including for canoeing, fishing and hiking "on wildlands and on freeflowing rivers" and "to maintain . . . undisturbed ecosystems." *Id.* § 3101(b).
- To "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so," where "consistent with management of fish and wildlife." *Id.* § 3101(c).
- To avoid "the need for future legislation designating" new parks in Alaska. *Id.* § 3101(d).

In all these provisions, Congress is plainly focused on purposes that require protection and regulation of waters.

Moreover, 13 provisions of ANILCA either established or supplemented a unit of the National Park System. In those sections, Congress provided a further statement of its purpose, specifying the natural features of the National Park System which Congress sought to protect. Those purposes all include the protection of waters, including rivers and lakes, the protection of fish and marine mammals, or both. *See* 16 U.S.C. §§ 410hh, 410hh-1.

The statute identified some waters by name, such as the Yukon-Charley Rivers National Preserve which, relevant here, includes the Nation River. 16 U.S.C. § 410hh(10) ("the entire Charley River basin"). With respect to the Yukon-Charley Rivers Preserve, Congress set the following terms:

> The preserve shall be managed for the following purposes, among others: *To maintain the environmental integrity of the entire Charley River basin, including streams, lakes* and other natural features, in its undeveloped natural condition for public benefit and scientific study; to protect habitat for, and populations of, fish and wildlife, . . .

Id. (emphasis added).[7] Again, Congress made clear that the specified waters are among the primary features of the National Park System that it intends to protect. Congress plainly did not conceive of those waters as state enclaves of authority within the parks and preserves.

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[7] *See also* 16 U.S.C. § 1274 (25)-(50). (designating 26 rivers as "Wild and Scenic Rivers" under the Wild and Scenic Rivers Act ("WSRA") to "be administered by the Secretary of the Interior" under the WSRA. *Id.*

It is extremely unlikely and, respectfully, absurd to conclude that Congress clearly and repeatedly announced its intent to protect the Nation River and other specified waters within Alaska National Parks and Preserves, while simultaneously withdrawing authority from the National Park Service to regulate those very rivers and waters. Congress's contrary intent is evident not only in its purposes and in establishing new Parks and Park areas, but also from its direction within ANILCA that the Secretary "shall administer the lands, waters, and interests therein" within the new Alaska areas of the National Park System *under the Organic Act*. *See* 16 U.S.C. § 410hh-2.

Second, ANILCA's express purposes and provisions relating to subsistence uses within the National Park System make little sense unless the Park System encompasses the navigable waters within park boundaries. Congress specifically sought to "provide the opportunity for rural residents engaged in a subsistence way of life," including subsistence fishing, to continue that way of life on "public lands" within the National Park System. *See* 16 U.S.C. § 3101(c); *id.* § 3112. These provisions clearly contemplate the protection of "subsistence activities" on public lands, which must include navigable waters to be effective. There can be no dispute that subsistence fishing "has traditionally taken place in navigable waters." *Katie John I*, 72 F.3d at 702. Yet petitioner's reading of ANILCA would have the nonsensical consequence of effectively removing subsistence fishing from the coverage of a statute that in Title VIII mentions fish 45 times.

Bluntly, Congress could not achieve its express purpose of protecting the subsistence way of life in

Alaska, which centrally depends upon subsistence fishing, without including navigable waters in ANILCA's "public lands." The importance of subsistence fishing to Alaska Native subsistence users cannot be overestimated. A ruling removing federal reserved waters from the definition of "public lands" would be a disaster for subsistence users considering "[a]pproximately 40 million pounds of fish and wildlife are harvested annually by subsistence users, of which fish account for 60 percent." Dep't of the Interior, *Environmental Assessment, Modification of the Federal Subsistence Fisheries Management Program* ch. III, at 1 (1997), *available at* https://www.doi.gov/sites/doi.gov/files/migrated/subsistence/library/ea/upload/EAModFSFMP.pdf. *See also* Alaska Dep't of Fish and Game, *Subsistence in Alaska: A Year 2014 Update*, https://www.adfg.alaska.gov/static/home/subsistence/pdfs/subsistence_update_2014.pdf.

As this Court has often said, statutes must be construed as a whole, and isolated sections must be considered in their context, with an eye toward accomplishing the broad objectives of the statute. *Sturgeon*, 136 S.Ct. at 1070; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *see also Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010). Faithful application of this principle demonstrates that the Secretary has authority to regulate navigable waters within National Parks and Preserves in Alaska.

CONCLUSION

For the foregoing reasons and those set forth by the United States, the Court should affirm the decision of the court of appeals.

Respectfully submitted,

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No. 17-949

In The
Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, in his Official Capacity as Alaska Regional Director of the National Park Service, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF ALASKA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Alaska National Interest Lands Conservation Act prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska.

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INTEREST OF AMICUS CURIAE

The State of Alaska's interest in this case is as a sovereign seeking to maintain regulatory control over tens of thousands of miles of its navigable waters. This case, before the Court for the second time, challenges a Ninth Circuit decision that interprets the Alaska National Interest Lands Conservation Act (ANILCA) as commandeering the State's traditional regulatory authority over its submerged lands and the navigable waters that flow over them for use by the United States. The decision below grants the National Park Service regulatory control over navigable waters wherever State-owned riverbeds fall within or are appurtenant to the boundaries of federal areas created by ANILCA, called Conservation System Units (CSUs)—notwithstanding the State's undisputed ownership of the submerged lands and ANILCA's express prohibition on treating state lands as though they are federally owned.

Alaska's "ownership of [its] submerged lands, and the accompanying power to control navigation, fishing, and other public uses of [its navigable] water is 'an essential attribute of sovereignty.'" *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) (quoting *United States v. Alaska*, 521 U.S. 1, 5 (1997)); *Coyle v. Smith*, 221 U.S. 559, 573 (1911). The State therefore has a compelling interest in maintaining its ability to manage those waters for the best interests of all Alaskans.

By interpreting ANILCA to federalize management of Alaska's navigable waters for all purposes, the Ninth Circuit dramatically redefined and expanded the federal reserved water rights doctrine. Its approach conflicts with this Court's cases and will adversely impact Alaska and its people. The ruling ignores the reality of life in rural Alaska, where residents face unparalleled access challenges, acutely rely on the State's natural resources, and regularly use the State's waterways as transportation thoroughfares. The State has a strong interest in preserving its authority to manage its waters as Congress intended: freely using the waters for beneficial purposes, regulating them in accordance with constitutional obligations to manage Alaska's waters for the benefit of all Alaskan citizens, and protecting the Alaskans who rely on access to and use of the State's waters to provide for their families.

SUMMARY OF THE ARGUMENT

As this Court has recognized, this dispute concerns "vital issues of state sovereignty." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1072 (2016). Since statehood, Alaska has owned the riverbeds of its navigable rivers. 43 U.S.C. § 1311(a); Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 339, 343 (1958). These rivers include the Nation River where John Sturgeon was operating his hovercraft in compliance with Alaska law; the Alagnak River where the National Park Service enforced federal regulations requiring Alaska to apply for

a permit to conduct salmon research in its own waters; the well-traveled Kuskokwim River where rural residents journey along waterways to access health care, food, fuel, and school supplies; and the thousands more rivers of great importance to Alaska and the Alaskans that depend on them. *See Alaska v. United States*, 201 F.3d 1154, 1164-66 (9th Cir. 2000); Pet. App. 32a-33a; Bureau of Land Management (BLM), Recordable Disclaimer of Interest (RDI), No. AA-086371 (June 10, 2013). Alaska's sovereign ownership of its submerged lands includes the right to regulate the waters that overlie them, *see United States v. Alaska*, 521 U.S. at 5, and the corresponding obligation to do so for the benefit of all Alaskans. Alaska Const. art. VIII, §§ 1-4, 14; *see Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

While Congress has the power to limit a state's sovereignty over its waters by directing federal regulatory control, a court cannot properly interpret a statute to have this effect "unless the intention was definitely declared or otherwise made very plain." *United States v. Alaska*, 521 U.S. at 34. Yet nowhere does ANILCA's text suggest Congress intended to give the Park Service plenary regulatory control over state waters that run through or are adjacent to a CSU. Instead, Congress endorsed Alaska's sovereign right to manage its lands, waters, and resources by providing that state, native corporation, and other private lands located inside CSU boundaries would not be managed as if they were federally owned. 16 U.S.C. § 3103(c). This distinction is essential to one of ANILCA's core purposes of

providing "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Sturgeon*, 136 S. Ct. at 1066; 16 U.S.C. § 3101(d). Alaska has a direct and profound interest in keeping its waterways open and regulating them in accordance with local needs, as Congress intended, and without broad federal regulatory interference.

But the Ninth Circuit's decision thwarts the plain text of ANILCA—stripping the law of the requirement that allows only waters to which the federal government has "title" to be considered public lands subject to federal management. *See* Pet. App. 16a. The court gave little attention to Alaska's sovereign interests, unconcerned that as a result of its decision, state land would be regulated as if it were public land, undermining ANILCA's explicit protections. Instead, the court enlarged the National Park Service's regulatory control over state waters—giving wholesale management authority to the federal government based on an unsupportable expansion of the federal reserved water rights doctrine. Pet. App. 12a-14a, 19a. The Ninth Circuit's decision contorts a doctrine that simply entitles the government to use or maintain a defined amount of water necessary for a specific purpose into a broad grant of regulatory authority that impermissibly overrides state regulation entirely. *See Cappaert v. United States*, 426 U.S. 128, 141 (1976); Pet. App. 16a. In so doing, the decision usurps the State's constitutional and statutory right to control its resources.

The Ninth Circuit ostensibly based its decision on the circuit's decades-old *"Katie John"* decisions. *See*

Pet. App. 13a; *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) [*Katie John I*]; *John v. United States*, 247 F.3d 1032 (9th Cir. 2001) (*en banc*) [*Katie John II*]; *John v. United States*, 720 F.3d 1214 (9th Cir. 2013) [*Katie John III*]). But the *Katie John* decisions arose in the distinct subsistence context out of a desire to effectuate Congress's clear intention that Title VIII of ANILCA include a meaningful rural subsistence preference. *Katie John I*, 72 F.3d at 704. Applying the reserved water rights doctrine for the limited purpose of effecting the subsistence priority explicitly found in Title VIII of ANILCA is a far cry from finding broad federal regulatory authority over Alaska's navigable waters for all purposes. The Ninth Circuit's reliance here on the reserved water rights doctrine as a basis for including Alaska's navigable waters in the category "public lands" means the exception now swallows the rule, and the doctrine is no longer limited in application as required by this Court.

The Ninth Circuit's decision on remand again effectuates a federal takeover of Alaska's navigable waters, on different but equally faulty grounds. The court's new rationale continues to improperly construe ANILCA and the balance it struck between federal and state authority in Alaska, and it compounds that problem with an unsupported expansion of the federal reserved water rights doctrine—to the detriment of Alaska and its people.

ARGUMENT

I. The Ninth Circuit's Decision Deprives Alaska of Its Sovereign Right To Manage Its Navigable Waters To Benefit Alaskans.

The Ninth Circuit's ruling transfers State decision-making authority over how best to manage Alaska's waters to a federal agency. The decision deprives Alaska and its people of a key component of sovereignty granted at statehood, and contradicts the constitutional and statutory balance between conservation and Alaska's interests in self-governance and resource development. The Ninth Circuit's decision thus strikes at the heart of Alaska's sovereignty and upsets Congress's intended federal-state balance. In so doing, it inflicts real harms on the people of the State.

A. Alaska's ownership of its lands and waters is an essential aspect of its state sovereignty.

Alaska's authority to manage its lands and waters is a particularly important sovereign interest, inextricably tied to its history and self-governance. Indeed, Alaskans' interest in controlling the state's fisheries without unwarranted federal control was a principal motivation for statehood. *See* Victor Fischer, *Alaska's Constitutional Convention* 7-8 (1975). But the territory's lack of taxable industry and population stood in the way of statehood: "One of the principal objections to Alaska's admittance into the Union was the fear that the territory was economically immature and would be unable to support a state government."

Trustees for Alaska v. State, 736 P.2d 324, 335 (Alaska 1987). Before statehood, 98 percent of Alaska's land was owned by the federal government, leaving "little land available to drive private economic activity and contribute to the state tax base." *Sturgeon*, 136 S. Ct. at 1065. Ultimately, the 1958 Alaska Statehood Act "permitted Alaska to select 103 million acres of 'vacated, unappropriated, and unreserved' federal land—just over a quarter of all land in Alaska—for state ownership." *Id.* (quoting Statehood Act, Pub. L. No. 85-508, §§ 6(a)-(b), 72 Stat. 339, 340 (1958)). Congress concluded that "the Statehood Act sufficiently provided for Alaska's financial well-being. The land grant of 103,350,000 acres was perceived . . . as an endowment which would yield the income that Alaska needed to meet the costs of statehood." *Trustees for Alaska*, 736 P.2d at 336.

Alaska's constitutional delegates viewed state management of the anticipated grant of lands, waters, and resources as a serious sovereign responsibility. They drafted an entire natural resources article in the Alaska Constitution—Article VIII—with provisions designed to conserve and protect the State's lands, waters, and other resources while allowing for responsible access and use. Alaska's Constitution reserves the State's resources to the people "for maximum use consistent with the public interest"; mandates that the State manage replenishable resources on the sustained yield principle; and ensures free access to Alaska's navigable and public waters. Alaska Const. art. VIII, §§ 1-4, 14.

Alaska owns the riverbed of the Nation River, where Mr. Sturgeon was approached by armed federal officials. *See Alaska v. United States*, 201 F.3d 1154, 1156, 1164-66 (9th Cir. 2000) (affirming finding of navigability of Nation River at statehood, placing riverbed under State ownership). Alaska, like all states, took title to the lands underlying its inland navigable waters as a matter of constitutional grace by virtue of the equal footing doctrine and as an "essential attribute" of state sovereignty. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987); *see also Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel*, 429 U.S. 363, 374 (1977) ("[T]he state's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself."). Congress formally recognized and codified this conveyance in the Submerged Lands Act. *Alaska v. United States*, 545 U.S. 75, 79 (2005) (citing 43 U.S.C. §§ 1301 *et seq.*, § 1311(a); Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 339, 343 (1958) (incorporating Submerged Lands Act)).

Alaska's ownership of its submerged lands includes the power to regulate the waters for its people. *See United States v. Alaska*, 521 U.S. at 5. Indeed, that is the purpose of state ownership of submerged lands. *See Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). Along with title to the submerged lands, the State received management power over the navigable waters themselves, including over the fish located in the waters. *See id*; 43 U.S.C. § 1311(a) (defining the rights of states to include "ownership of the natural

resources within such lands and waters" and the "right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law"); 43 U.S.C. § 1301(e) (defining "natural resources" to include fish). A state's title to land underlying navigable waters includes the power, as the sovereign, "to control and regulate navigable streams." *Coyle v. Smith*, 221 U.S. 559, 573 (1911). States hold submerged lands in trust for the public to use the waterways for commerce, navigation, and fishing. *Illinois Cent. R.R. Co.*, 146 U.S. at 452 (holding state's title to lands under navigable waters "necessarily carries with it control over the waters above them"). Alaska statutes interpreting the Alaska Constitution similarly provide that Alaska "holds and controls all navigable or public water in trust for the use of the people of the state." Alaska Stat. § 38.05.126(b); *see also* Alaska Stat. §§ 38.05.127-.128.

Allowing the Park Service to broadly usurp the State's control over its navigable waters and manage the State's navigable waters as if they were a federal park infringes on Alaska's sovereign authority and responsibility to its people. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) (acknowledging that "navigable waters uniquely implicate sovereign interests"); *United States v. Alaska*, 521 U.S. at 5 (holding that ownership of submerged lands "is an essential attribute of sovereignty"). Such a federal takeover would thwart the public trust doctrine and hinder Alaska's sovereign power to ensure open access to its

waters for navigation, fishing, and commerce. *See Illinois Cent. R.R. Co.*, 146 U.S. at 452.

Another example of intrusive federal authority is found in Alaska's companion case, decided together with Sturgeon's in a consolidated opinion before the Ninth Circuit, No. 13-36166. Pet. App. 38a. There, Alaska challenged Park Service regulations requiring the Alaska Department of Fish and Game to obtain a permit before engaging in scientific research involving genetic sampling of chum and sockeye salmon on the State-owned Alagnak River. Pet. App. 30a, 38a. By requiring the State to ask for advance permission before accessing its own lands to conduct beneficial scientific research, the federal government unduly interferes with Alaska's ability to make use of its resources. Compliance with the permit's terms forced Alaska to accede to obligations and limitations that undermined its sovereign rights, including a prohibition on destroying the State's own research specimens without Park Service authorization; an obligation to "catalogue collected specimens into the NPS's Interior Collection Management System and label such specimens with NPS accession and catalog numbers"; and a requirement "to submit an Investigator's Annual Report and copies of other final reports and publications resulting from the study within a year of publication." Pet. App. 38a. Thus, under the Ninth Circuit's decision here, the Park Service has jurisdiction not only to unilaterally restrict access to Alaska's waters, but also to control whether and how Alaska conducts its own fisheries management

research—a shocking overreach of agency authority not reflected in any congressional text.

B. Loss of Alaska's sovereign power to manage its own waters will inflict serious harm on ordinary Alaskans.

Alaska's sovereign interests in its waters are not merely academic. The loss of State management authority inflicts real and unique harms on not just the State, but on ordinary Alaskans. Alaska is home to abundant natural resources, including over 12,000 rivers and three million lakes—the largest network of navigable waters in the country. Alaska has more than 100,000 miles of navigable waters, covering a greater area than the navigable waters of all the contiguous States *combined*. The State also is home to myriad fish and wildlife, significant oil and natural gas reserves, and economically viable subsurface mineral deposits. Alaska's vast terrain and wild beauty captivate the national imagination and its bounty of resources fortifies both the state and national economies. But Alaska's massive size, widely dispersed population, lack of developed infrastructure, variable topography, and extreme climate also make it the nation's most inaccessible state.

Over three-quarters of Alaska's 300 communities and roughly twenty percent of its 735,000 residents live in regions unconnected to the road system. Half of these residents live in the State's most remote villages, communities with disproportionately higher levels of

poverty and limited infrastructure, some lacking essential services like sanitation and safe drinking water. Rural citizens rely heavily on Alaska's resources to provide for their families. The State's ability to manage these resources in accordance with unique realities, local needs, and historical customs is thus critical to its sovereign interests.

Alaskans living off the road system primarily travel by all-terrain vehicles, small airplanes, snowmachines, and boats. Alaska's extreme climates and varied terrain further shape the unusual nature of the State's limited transportation options: severe storm patterns routinely disrupt air service and rivers seasonally evolve into ice roads. Alaska's waters provide essential travel corridors year round. Many rural citizens live in small, isolated villages stretched along rivers, and depend on these networks of water connections for their everyday needs. Major rivers like the Yukon and Kuskokwim serve as critical arteries for transporting commercial fuel and goods to much of western Alaska throughout the summer months. Especially in more remote areas, Alaskans rely on these waters to access health care, goods, and services; recreate; and travel to hunting and fishing grounds. In winter, Alaska's rivers freeze into highways for snowmachine, dogsled, and other vehicle traffic, remaining a vital part of the State's transportation infrastructure so that Alaskans can access vital natural resources as well as commercial goods and services. Alaska's rivers have functioned in this way for hundreds of years.

Because Alaska's rural villages are so isolated, residents in these communities also face economic challenges. Rural residents confront a formidable combination of high costs of living, little or no local tax base, few job opportunities, and limited earnings. Localized resource-based activities—such as local tourism and recreation-related jobs or small-scale mining, sport fishing, wildlife guiding, or trapping—often provide an essential part of families' incomes and contribute to the economic activity of the region.

Alaska has an acute interest in retaining its management authority over water-based access routes to address local needs—needs that might be ignored or eclipsed by federal land management agencies with singular preservationist priorities and a national constituency. *See, e.g.*, 54 U.S.C. § 100101 (describing purpose of Park Service regulation as "to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations"). State regulators understand the unusual realities of life in Alaska and use that knowledge to design rules that consider local conditions, practices, and needs. But federal regulators—who may never even visit Alaska, let alone develop a nuanced understanding of the unique aspects of rural Alaskan life—lack this knowledge or focus. As a result, the regulations they impose can be ill-fitting for Alaska. For example, in permitting hovercraft to operate on state waters,

Alaska has prioritized opening its waters to meet the access and transportation needs of residents like Mr. Sturgeon. But in conflict with Alaska's priority, the Park Service intercepted Mr. Sturgeon and barred him from taking his hovercraft to non-federally owned hunting grounds. The federal government's national prohibition on hovercraft use[1] might be sensible in Lower 48 parks where waters are often used only for recreational activities and tourism, but it is overbearing and harmful in Alaska, where, even in remote wilderness areas, citizens must use rivers for everyday transportation and to access necessities like food, fuel, and health care. In addition, while federal environmental policy may wax and wane with different administrations, Alaska remains under a continuing constitutional obligation to manage its resources responsibly according to sustained yield and other conservation principles. Alaska Const. art. VIII, §§ 1-4, 14.

What is at stake here for Alaska, therefore, is not just a disagreement with the National Park Service about permissible weekend recreation or the best method of routing tourists through national parks. Because "Alaska is different," *Sturgeon*, 136 S. Ct. at 1070, the State's continued management of its lands and waters is essential to maintain unencumbered

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[1] The regulation prohibiting hovercraft use, 36 C.F.R. § 2.17(e), "is not limited to Alaska, but instead has effect in federally managed preservation areas across the country." *Sturgeon*, 136 S. Ct. at 1067. It is not one of the Alaska-specific provisions "woven throughout ANILCA" that reflect Congressional attention to Alaska's uniqueness. *Id.* at 1071.

access and meaningful use of Alaska's natural resources by its citizens.

C. ANILCA's requirement that state lands be treated differently from federal lands protects Alaska's sovereign rights.

ANILCA reserved over 100 million acres of federal land in Alaska—an area larger than California—for the primary purposes of conservation and protection. 16 U.S.C. §§ 3101 *et seq*. Vast swaths of Alaska's new and expanded national parks, wildlife refuges, wild and scenic rivers, national trails, wilderness areas, and national forest monuments were organized into CSUs managed by different federal land management agencies. 16 U.S.C. § 3102(4). But ANILCA's CSU boundaries do not closely mirror federal land holdings: for every six acres of federal land within the CSUs there is one acre of non-federal land.

While ANILCA reserved massive amounts of land—significantly limiting the possibility for Alaska's future economic development—it also included provisions meant to protect Alaska's sovereignty, economic well-being, and way of life. As this Court explained, ANILCA had twin goals: to protect the national interest in scenic, natural, cultural, and environmental values on public lands in Alaska, but also to continue to "provide[ ] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and

its people." 16 U.S.C. § 3101(d); *accord Sturgeon*, 136 S. Ct. at 1066.

Congress protected Alaska's ability to direct the use of its own lands and waters in numerous ways. First, Section 103(c) assures Alaska's sovereign authority to manage its waters and lands by excluding from CSUs non-federal lands that happen to be located within unit boundaries. 16 U.S.C. §§ 3103(c), 3102(1), (3)(B)-(C), (11). This exclusion covered the lands and waters owned by the State, Alaska Native Corporations, and other private landowners at the time of ANILCA's passage. Second, ANILCA expressly states that non-federal "lands"—defined to include waters as well as uplands—falling within newly expanded park boundaries would not be regulated as if they were federally owned. 16 U.S.C. §§ 3102(1), 3103(c) (providing non-federal lands are not "subject to the regulations applicable solely to [federal lands] within such units").

Third, Section 103(c) provides that, should the federal government wish to regulate non-public lands as part of a system unit, it must first acquire them; only then may the new lands become part of the unit and "be administered accordingly." 16 U.S.C. § 3103(c). This is not to say that Congress exempted non-federal lands within CSUs from all federal oversight—instead Congress left in place (and unaffected by ANILCA) "[f]ederal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act . . . and other federal statutes and regulations of general applicability." S. Rep. No. 96-413, 303, reprinted in 1980 U.S.C.C.A.N. 5070, 5247. But by removing

these non-federal lands and waters from the reach of the extensive regulatory regime applicable to federally owned parklands nationwide and drawing hard boundaries between how the different categories of lands should be treated, Section 103(c) limits federal jurisdiction and protects against abuse of federal regulatory power. Finally, ANILCA contains a water rights savings clause specifying that the Act may not be construed as "(1) affecting in any way any law governing appropriation or use of, or Federal right to, water on lands within the State of Alaska"; "(2) as expanding or diminishing Federal jurisdiction, responsibility, interests, or rights in water resources development or control"; or "(3) as superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various" federal regulatory agencies involved in the Act. 16 U.S.C. § 3207.

Now, despite this Court's direction on remand to construe ANILCA in light of Alaska's uniqueness and the statute's language and context, *Sturgeon*, 136 S. Ct. at 1070-71, the Ninth Circuit again nullified that guarantee, awarding the Park Service—and presumably other federal land management agencies—broad authority to regulate state waters as though they were federal lands. The Ninth Circuit's decision endorses further federalization of State-owned resources and subjects Alaskans to federal regulatory control in a manner that Congress neither authorized nor intended.

II. The Ninth Circuit's Decision Misapplies § 103(c) and the Federal Reserved Water Rights Doctrine.

The Ninth Circuit's decision is not only based on its continued misreading of § 103(c), but also its fundamental misapplication of the federal reserved water rights doctrine. The Ninth Circuit ignores the clear statement rule, disregards congressional intent, and stretches the federal reserved water rights doctrine beyond all recognition by concluding that the Nation River—a navigable waterway owned and traditionally regulated by the State—qualifies as "public lands" because Congress implicitly reserved an undefined and unquantified amount of water when it created the Yukon-Charley preserve.

A. ANILCA does not contain the required clear statement of congressional intent to divest Alaska of control over its navigable waters.

The Ninth Circuit's analysis on remand ignored the gatekeeping legal doctrine that protects against unsanctioned federal encroachments on State power: the clear statement rule. This Court has held that "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear *in the language of the statute*." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)) (internal quotation marks omitted; emphasis added); *accord Vermont*

Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 787 (2000). The clear statement rule requires that any infringements on state sovereignty be "plain to anyone reading the [statute]." *Gregory*, 501 U.S. at 467. The rule is "an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461. It is a crucial check on agency overreach based on the bedrock principle that "Congress does not exercise lightly" the "extraordinary power" to "legislate in areas traditionally regulated by the States." *Id.* at 460.

The clear statement rule directly applies to this case, where the Federal Government seeks to override Alaska's "traditional and primary power over land and water use" by forcibly divesting Alaska of its authority over its submerged lands and navigable waters. *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (quoting *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) [*SWANCC*]). The rule applies "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 172-73. In *SWANCC*, the Court held that the clear statement rule foreclosed federal regulation of state waters where—as in this case—the proposed regulation was not clearly authorized by statute, would usurp traditional state sovereignty, and raised significant constitutional questions regarding the extent of federal authority. *Id.* at 172-74.

Instead of applying the clear statement rule as this Court's precedents direct, however, the Ninth Circuit approached the case as a routine question of statutory construction, disregarding the strength of Alaska's sovereign interests entirely in favor of a quest for definitional uniformity of the term "public lands" throughout the statute. Pet. App. 13a-14a. The Court began its analysis at the wrong place by assuming that *Katie John*'s narrow, context-based holding must be expanded to the entire statute. But the clear statement rule is not optional, and statutory construction canons alone can neither substitute for Congressional authorization nor overcome the lack of authority delegated by Congress. Proper application of the clear statement rule would have required finding in Mr. Sturgeon's favor. Instead, the Court skipped over this step, leading it to improperly expand *Katie John*'s holdings to justify a wholesale takeover of Alaska's navigable waters for non-subsistence purposes that Congress did not intend or sanction.

The Ninth Circuit's decision on remand flatly contravenes the clear statement rule. In direct conflict with this Court's precedents, the Ninth Circuit has authorized federal agencies to usurp Alaska's regulatory power along more than half of the State's navigable waters, based on a reserved water rights concept that appears nowhere in ANILCA's text or legislative history. Nor does ANILCA's definition of "public lands" as "lands, waters, and interests therein" the "title to which is in the United States," 16 U.S.C. § 3102(1), (2), clearly and manifestly include navigable waters,

because the government does not hold "title" either to an inchoate use right to a quantity of water, or to the underlying submerged lands. In fact, Congress expressed the intent to *exclude* navigable waters from the definition of "public lands," by explicitly exempting all "lands . . . granted to the Territory of Alaska or the State under any other provision of Federal law." 16 U.S.C. § 3102(3)(A). And as discussed above, § 103(c) compels the same conclusion.

The Park Service may argue that the federal government's navigational servitude justifies the infringement on Alaska's sovereignty here, BIO at 12, but this argument too ignores the clear statement rule. *See Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954) (holding that "the exercise of that servitude, without making allowances for preexisting rights under state law, requires clear authorization"). While the federal government possesses the theoretical power to override State regulation to protect navigation, it simply has not exercised that power here. The navigational servitude is a Commerce Clause power, *see, e.g., United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28 (1961), and ANILCA invoked the Commerce Clause only in connection with Title VIII's subsistence provisions. 16 U.S.C. § 3111(4). It has not granted the Park Service *any* authority under the Commerce Clause to regulate Alaska's waters for non-subsistence purposes. *See Katie John I*, 72 F.3d 698, 703 (9th Cir. 1995) ("Neither the language nor the legislative history of ANILCA suggests that Congress intended to exercise its Commerce Clause powers over

submerged lands and navigable Alaska waters."). A power that Congress declined to exercise cannot justify infringing Alaska's sovereignty.

B. Alaska's navigable waters are not public lands.

Equally compelling as ANILCA's silence on the subject of usurping traditional state power is what ANILCA does say about the dichotomy between the government's regulatory authority on public and non-public lands. ANILCA authorizes the federal government to regulate "public lands," which it defines as a subset of "[f]ederal lands." 16 U.S.C. § 3102(3) (excluding certain state and native corporation land selections). "Federal land" in turn is defined as "lands the *title* to which is in the United States." *Id.* § 3102(2) (emphasis added). And "land" includes "lands, waters, and interests therein." *Id.* § 3102(1). The Ninth Circuit's conclusion that Alaska's navigable waters are "public lands" under these definitions is unsupportable.

The United States does not hold "title" to navigable waters in which it has an implied water right, let alone to the submerged lands underlying Alaska's navigable waters. The Ninth Circuit conceded that "[r]eserved water rights are not a 'title' interest . . . in a narrow, technical sense," Pet. App. 16a (internal quotation marks omitted), but nevertheless found "a vested interest in the water" to be good enough. *Id.* at 17a. Even if an inchoate reserved water right that has

never been adjudicated and is not tied to the need for any particular quantity of water could properly be described as "vested," it still would not be sufficient to qualify as a title interest under ANILCA. If Congress intended that a non-title, judicially-created "interest" in theoretical uses of water could make a river "public lands" that are fully subject to the power of federal regulation, it would have written the statute to say that. It did not.

The Ninth Circuit reasoned that "the United States has an implied reservation of water rights [in the Nation River], rendering the river public lands." Pet. App. 19a. The court held that "non-public land is still subject to [regulations applicable only to public lands] if the United States retains an interest in it because the land is public to the extent of the interest." Pet. App. 8a. But this fails to honor the sovereignty protections of § 103(c). First, by defining public lands broadly enough to encompass State-owned waters, the Ninth Circuit decision disregards ANILCAs admonitions that state lands within the boundaries of the CSU are not part of the CSU and the government must first acquire those lands if it wants to regulate them. Second, the holding ignores the plain text of ANILCA, which cautions that land belonging to the State cannot be regulated as if it were public land. 16 U.S.C. § 3103(c).

And because the decision does not purport to defeat the State's continued title to its submerged lands, the regulations unlawfully regulate the State-owned submerged lands as if they were public lands. These

regulations do not apply only to a hypothetical "non-state" portion of the lands; they control what vehicles can travel on the submerged land, and what scientific studies Alaska can perform on riverbeds that it owns. Indeed, Mr. Sturgeon was stopped on a gravel bar between the ordinary high water marks of the Nation River—in other words, on State-owned submerged lands—illustrating how the decision in a very real way affects not only Alaska's sovereignty over state waters, but also over state submerged lands.

C. Even if the government has a reserved water right in the State's waters, that right is to use a defined quantity of water, not to supersede Alaska's regulation of navigable waters.

The Ninth Circuit's analysis also vastly overinflates the proper scope of any federal reserved water right by transforming a limited federal right to reserve a specific quantity of water into an assumption of total regulatory control over all the water. Its decision bootstraps a limited reserved water right into a full titled interest in order to find broad federal regulatory authority—causing the exception to swallow the rule, and to the detriment of Alaska. The court first achieves this by attempting to divorce Alaska's title ownership of the submerged lands from its sovereign responsibility over the navigable waters above them. Pet. App. 10a.

Although navigable waters themselves are not usually considered subject to traditional title

ownership, a sovereign's title to the bed of navigable waters "necessarily carries with it control over the waters above them." *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). Thus, the Submerged Lands Act recognized State assumption of both "submerged lands and waters." *United States v. California*, 436 U.S. 32, 37 (1978). This control and authority is constitutionally based, not merely statutory; under the equal footing doctrine, "the State's title to navigable waters within its boundaries is conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). Thus, "[u]pon statehood, the State gains title within its borders to the beds of waters then navigable" as a matter of constitutional grace, allowing it to "allocate and govern those lands according to state law" as sovereign. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012). Ever since statehood, then, Alaska has had sovereign control and management authority over its waters.

The Ninth Circuit's reasoning creates a strange disconnect between submerged lands and the waters above. The court acknowledged that Alaska holds title to the submerged lands underlying the Nation River, but it simultaneously held that the waters themselves are federal public lands subject to broad federal jurisdiction based on the government's reserved water right. Pet. App. 10a, 13a. This reasoning appears to decouple the state's control and management of the waters from its sovereign ownership of the submerged lands underneath them. But it has been well-settled

for over a century that a state's title to land underlying navigable waters includes "the right to control and regulate navigable streams." *Coyle v. Smith*, 221 U.S. 559, 573 (1911); *see also Illinois Cent. R.R. Co.*, 146 U.S. at 452. Congress also has enshrined this principle in statute. 43 U.S.C. § 1311(a) (defining the rights of states to include "ownership of the . . . natural resources within such lands and waters" and "the right and power to manage, administer, lease, develop, and use said lands and natural resources all in accordance with applicable State law.") The Ninth Circuit did not explain how ownership and control of the waters and lands could properly be split apart, either as a practical or legal matter.

The decision also inappropriately transforms the very nature of a federal reserved water right from a limited interest—allowing the government to *use* a specified amount of water—into an extremely broad jurisdictional doctrine—allowing the government to *assume full regulatory control* over entire rivers. This tremendous leap is entirely unsupported by law. Under this Court's jurisprudence, a federal reserved water right is a limited, non-ownership right to use or preserve a specific volume of water. *Cappaert v. United States*, 426 U.S. 128, 138-41 (1976). When the federal government withdraws and reserves lands for a public purpose, such as creating a national park, it "by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Id.* at 138. This Court has strictly limited the scope of this doctrine: it applies only to "that

amount of water necessary to fulfill the purpose of the reservation, no more." *Id.* at 141; *see also United States v. New Mexico*, 438 U.S. 696, 700 (1978).

Thus, in *Cappaert*, this Court examined the extent of the federal government's reserved water right in the Devil's Hole National Monument, a deep limestone cavern in Nevada containing a subterranean pool home to a rare and endangered pupfish. In establishing the national monument, Congress's direction to give special protection to the pool and the fish living in it established a federal reserved water right—but the government's interest extended only to preserve the exact amount of water necessary to keep the fish alive. *Id.* at 141. To ensure that the doctrine remains limited to the amount of water absolutely necessary to fulfill the government's purposes—a crucial check on federal authority—courts applying the doctrine "carefully examine[] both the asserted water right and the specific purposes for which the land was reserved, and [must] conclude[] that without the water the purposes of the reservation would be entirely defeated." *New Mexico*, 438 U.S. at 700.

The Ninth Circuit did not even try to adhere to this limiting principle. It made no attempt to constrain the scope of the Park Service's reserved water rights in accordance with this Court's case law, instead effectively granting the Park Service the broad, general regulatory authority that § 103(c) expressly prohibits. The court held that the Park Service's reserved water right extended to prevent any water use that might merely *impact* the purposes of the reservation. App.

17a-18a. This novel redefinition of federal reserved water rights vastly expands the doctrine and usurps Alaska's sovereign authority just because there may be *some* federal interest in *some* use of the water as a theoretical matter. And the Ninth Circuit's analysis no longer treats the reserved water rights doctrine as concerning use of a particular amount of water, as this Court has required. Instead, the Ninth Circuit has invoked the doctrine to justify a wholesale grant of federal management authority over Alaska's navigable waters. This is a startling expansion of the doctrine, and one with no foundation in this Court's jurisprudence.

Congress did not intend that a federal usufructuary right—an interest far less than title—would transform entire rivers into "public land," enabling broad federal regulation for all purposes. Section 103(c) itself makes this clear, since it limits the ability of the Secretary of the Interior to regulate state, private, or other non-federal lands unless it purchases or otherwise acquires them. Yet the Ninth Circuit now gives the Park Service this right to regulate state waters without any purchase, compensation, or acquiescence from the State. This Court should reject the Ninth Circuit's tortured reformulation of the federal reserved water rights doctrine, which contravenes federal law and undermines Alaska's sovereign rights.

III. In Restoring Alaska's Sovereignty Over Its Navigable Waters, this Court Need Not and Should Not Disturb the *Katie John* Circuit Precedents.

The Ninth Circuit's federal reserved water rights holding in this case was based on an unwarranted expansion of prior Circuit precedent, the *Katie John* decisions, which expanded the definition of public lands to include state-owned navigable waters in order to address an express and discrete part of ANILCA: Title VIII (Subsistence Management and Use), 16 U.S.C. §§ 3111-3126. *See Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) [*Katie John I*]; *John v. United States*, 247 F.3d 1032 (9th Cir. 2001) (*en banc*) [*Katie John II*]; *John v. United States*, 720 F.3d 1214 (9th Cir. 2013) [*Katie John III*]). In Title VIII, Congress created a priority in the taking of fish and wildlife on public lands for rural subsistence users—Alaskans who practice and depend upon the "customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal and family consumption as food, shelter, fuel, clothing, tools, or transportation." 16 U.S.C. § 3113.

The *Katie John* decisions are not at issue in this appeal; the Question Presented concerns only Mr. Sturgeon's non-subsistence use of the Nation River, which does not fall within or implicate Title VIII at all. Neither party has asked this Court to overrule or reconsider *Katie John* in connection with Mr. Sturgeon's case. Thus, this Court need not directly address the prior circuit holdings in order to resolve this appeal.

Nor should the *Katie John* and *Sturgeon* decisions be tied together as the Ninth Circuit has done. Title VIII stands apart from the rest of ANILCA with its own findings, 16 U.S.C. § 3111, its own statement of policy, 16 U.S.C. § 3112, and—unlike any other part of the legislation—specific invocations of congressional authority under the Commerce Clause, the Property Clause, and Congress's "constitutional authority over Native affairs." 16 U.S.C. § 3111(4). Furthermore, while Congress began with the assumption and expectation that the State would enact and assume management authority over its subsistence regulations, as a backstop, Congress included language authorizing the federal government to step in if Alaska failed to act. 16 U.S.C. § 3115(d); *Katie John I*, 72 F.3d at 700 n.2. When the State found itself constitutionally unable to enforce state laws implementing the subsistence priority demanded by Congress because of the state constitutional guarantee of equal access to fish and game, *McDowell v. Alaska*, 785 P.2d 1, 5-9 (Alaska 1989), the federal government took over. *See Katie John I*, 72 F.3d at 701.

The Ninth Circuit decisions upholding this takeover of subsistence regulation were attempting to reconcile what were perceived as two conflicting statutory demands: the definition of public lands—which on its face does not include State navigable waters because Congress required a federal title interest—and the rural subsistence preference over fishing, which the court believed needed to include the navigable waters containing the fish in order to fulfill Congressional intent.

See, e.g., *Katie John I*, 72 F.3d at 704 ("We recognize that our holding may be inherently unsatisfactory. . . . If we were to adopt the state's position, that public lands exclude navigable waters, we would give meaning to the term 'title' in the definition of the phrase 'public lands.' But we would undermine congressional intent to protect and provide the opportunity for subsistence fishing. . . . The issue raised by the parties cries out for a legislative, not a judicial, solution."). Since the *Katie John* rationale was rooted in Congress's discrete intent that there be an enforceable subsistence priority, nothing in the decisions' rationale warrants expanding their definition of public lands outside the subsistence realm. The Ninth Circuit identified a direct conflict within the statute between two commands—on the one hand, 16 U.S.C. § 3114's command that there exist an enforceable subsistence priority; and on the other, the statutory definition of "public lands," which would seem to vitiate that command (at least where Alaska is unable to effectuate the priority itself). By contrast, there is no conflict between the rest of ANILCA and the definition of "public lands." To the contrary, reading "public lands" according to its plain meaning in non-subsistence contexts effectuates the statute's purposes.

There are also prudential and policy reasons why this Court should preserve the *Katie John* precedents. Congress mandated the subsistence priority to protect the important values embodied by subsistence, 16 U.S.C. § 3111, and in the nearly twenty years since the federal government assumed management of

subsistence activities on federal lands in Alaska, rural Alaskans have depended on this subsistence priority to effectuate those values and preserve their way of life. Congress found that subsistence use by Alaskans is "essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence." 16 U.S.C. § 3111(1). It also found that many Alaskans had no realistic alternative to subsistence that could possibly "replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses." 16 U.S.C. § 3111(2). Congress's observations remain true today. The State's rural residents currently harvest about 18,000 tons of wild foods each year, averaging 295 pounds per person. And to many Alaska Natives, subsistence is not a recreational or purely practical activity, but rather a way of life, the lifeblood of cultural, spiritual, economic, and physical well-being. Subsistence activities under ANILCA are also crucial to Alaskans living in remote, undeveloped settings where residents rely on customary and traditional harvest of wild and natural foods because access to packaged and other processed and non-local foodstuffs may not be available at a reasonable price—or any price. Limited or nonexistent job opportunities to earn cash wages in rural Alaska, the high costs of living in remote areas, and the seasonal nature of rural Alaskan life further enhance the importance of subsistence to rural residents.

The Ninth Circuit believed that—having decided in *Katie John* that for Title VIII purposes that Alaska's

navigable waters are public lands by virtue of federal reserved water rights—it had no choice but to broaden that holding to apply with equal force to Mr. Sturgeon's non-subsistence activities. This reasoning is unsustainable and incorrect. The Ninth Circuit itself has recognized that *Katie John* was a "problematic solution to a complex problem, in that it sanctioned the use of a doctrine ill-fitted to determining which Alaskan waters are 'public lands' to be managed for rural subsistence priority under ANILCA." *Katie John III*, 720 F.3d at 1245. Instead of restricting the narrow, fact-specific holding to the unique context in which it arose and where it served to effectuate Congress's intent, the Ninth Circuit now has expanded it into a widespread, generally-applicable doctrine that entirely redefines federal reserved water rights law, where Congress has not willed it. This Court should reject the expansion of a compromise solution to a discrete problem into a wide-ranging justification for intrusive federal management of state lands and waters throughout Alaska.

"[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Although the Ninth Circuit believed itself controlled by its prior construction of the term "public lands" in the unique context of Title VIII, in fact, the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning" is not

controlling. *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). This Court has stressed that "the presumption of consistent usage readily yields to context, and a statutory term—even one defined in the statute—may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2441 (2014) (Scalia, J.) (quoting *Duke Energy Corp.*, 549 U.S. at 574 (internal quotation marks omitted)).

This case presents a salient example of a circumstance where a complex statute's use of a term in different contexts is properly interpreted differently. Like the Clean Water Act, which was at issue in *Utility Air Regulatory Group*, ANILCA is a long, complex, and multifaceted statute. The context of Title VIII and the remainder of ANILCA differ in material and significant ways. Unlike the bulk of the statute, Title VIII explicitly calls upon separate Congressional policies and findings of purpose. 16 U.S.C. §§ 3111, 3112. Title VIII draws on the authority of the Property Clause, the Commerce Clause, and Congress's special powers over Native American affairs—constitutional sources of law that are conspicuously absent from the remainder of the statute. 16 U.S.C. § 3111(4). And Title VIII explicitly contemplates federal regulation if necessary to ensure that rural Alaska residents can engage in traditional and customary subsistence fishing activities. 16 U.S.C. § 3115(d). Furthermore, the Ninth Circuit itself has recognized that *Katie John*'s resolution of the meaning of "public lands" to incorporate a

federal reserved water rights rationale was employed only to effectuate Congressional intent. *Katie John I*, 72 F.3d at 704. None of this applies to the remainder of the statute. This Court need not and should not overrule *Katie John*, but it should reverse the Ninth Circuit's expansion of *Katie John* beyond the narrow and unique context in which it arose.

IV. The Park Service's Attempt To Regulate Non-Federal Waters Within CSU Boundaries Cannot Be Alternatively Justified by 54 U.S.C. § 100751(b).

For all the above reasons, the Ninth Circuit's decision is wrong and this Court should reverse it. But, as it did before, the Park Service may press an alternative rationale as a basis for affirmance by arguing that it does not matter whether Alaska's navigable waters are public lands or not. BIO at 14-15. The Park Service believes it has the authority to regulate both public and non-public lands alike pursuant to 54 U.S.C. § 100751(b), which provides that the Secretary may promulgate regulations "concerning boating and other activities on or relating to water located within System units." In the government's view, the "on or relating to" language gives the Park Service broad authority to regulate all the waters within CSU boundaries, even if they are not public lands. BIO at 14-15. This Court should reject any such claim. Alaska's ownership of submerged lands and corresponding right to regulate its navigable waters has meaning. If the Nation River and the rest of Alaska's navigable waterways are not

public land, the Park Service cannot nonetheless regulate them with the same regulations that apply to actual federal lands.

Allowing regulation of Alaska's lands and waters on the theory that they "relat[e] to" public lands would eviscerate § 103(c) and contravene the intent of Congress. This Court already has held that because "ANILCA repeatedly recognizes that Alaska is different," a reading of the law that does away with § 103(c)'s distinction between public and non-public land is unsustainable because it is "contorted and counterintuitive." *Sturgeon*, 136 S. Ct. at 1070-71. Allowing the Park Service to evade § 103(c)'s explicit limitations on federal jurisdiction over non-public lands merely by claiming that the non-public land is "relat[ed] to" public land would run afoul of this admonition. It would also render § 103(c) toothless and meaningless. After all, if all land and waters within CSU boundaries fall under federal jurisdiction merely because they "relat[e] to" adjacent public lands, then Congress's command that non-federal land must be treated differently from federal land would mean nothing at all. Such an interpretation would contravene "one of the most basic interpretive canons": "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotation marks omitted)). This Court should reject the Park Service's continuing efforts to nullify § 103(c).

CONCLUSION

The Court should reverse, restoring Alaska's sovereignty and fulfilling Congress's promise.

Respectfully submitted,

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No. 17-949

IN THE

Supreme Court of the United States

JOHN STURGEON, PETITIONER

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AND CENTRAL NEW YORK FAIR BUSINESS ASSOCATION AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. Central New York Fair Business Association (CNYFBA) is a member organization of CERA and is incorporated as a non-profit in Oneida, New York. CERF and CNYFBA are primarily writing this *amici curiae* brief to explain why the federal reserved rights doctrine must be limited by the structure of the Constitution as a matter of federalism to protect the individual rights of the people to self-governance at both the state and national level.[1]

CERF submits this second *amici curiae* brief in this case to explain how this Court can apply political accountability federalism as recently adopted in *Murphy v. NCAA*, 138 S.Ct. 1461 (2018) to limit the reach of the federal reserved rights doctrine. CERF believes this case demonstrates how the individual liberty of Mr. Sturgeon has been completely usurped by the National Park Service in asserting it can claim jurisdiction over the waterways of Alaska despite the

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amici curiae*, CERF, its members or its parent CERA's members including Central New York Fair Business, or its counsel have made any monetary contribution to the preparation or submission of this brief.

express language of Congress to the contrary. In its *amici curiae* brief for this case on petition CERF introduced facts from two newly located historic documents. The memorandum "Embargo on the Upper Rio Grande" explains how the federal reserved water rights doctrine was created through deliberate fraud by the United States. The second memorandum "Federal Irrigation Water Rights" explains how all waters can be subjected to federal authority using the plenary power that is the basis of the federal reserved rights doctrine. This memorandum is attached as an appendix to this *amici* brief. Counsel will use the federal government's own words to explain how the federal reserved rights doctrine has resulted in the complete denial of federalism and confronts the public trust doctrine authority of the State of Alaska and liberty interest of Mr. Sturgeon to traverse the navigable waterway with his hovercraft. Mr. Sturgeon filed a blanket consent and the United States consented by letter to the filing of this *amici curiae* brief.

SUMMARY OF THE ARGUMENT

CERF and CNYFBA are not going to repeat the arguments made in the *amici curiae* brief submitted to this Court at the petition stage. Whether or not this Court believes the federal reserved rights doctrine was created through fraud or not does not change the fact that the Ninth Circuit decision in this case has just expanded it to apply against all claims of state jurisdiction over waterways if the decision is upheld. While CERF supports the positions of Mr. Sturgeon and the State *amici* that the Ninth Circuit did not properly apply existing law and legal doctrines CERF will attempt to apply the political accountability

federalism argument used in *Murphy v. NCAA*, 138 S.Ct. 1461 (2018) to convince this Court that the Ninth Circuit decision should be reversed.

This Court correctly assumed that the Department of Justice was adhering to the federal Indian policy adopted by Congress following the Civil War. The 1871 Indian Policy was and is a war power policy. This policy continued the use of the war powers from the Civil War in the national government. Adhering to this policy, this Court deemed that the authority of Congress over the Indians was plenary. *See United States v. Kagama*, 118 U.S. 375 (1886). This Court allowed the Department of Justice to successfully assert that it had an overriding federal national interest to protect claimed rights of the Indians while it was suppressing them. Attorneys for DOJ created the federal reserved rights doctrine to further and enforce the plenary power of Congress. *See United States v. Winans*, 198 U.S. 371 (1906) and *Winters v. United States*, 207 U.S. 564 (1908). The United States represented by the Department of Justice (DOJ) implied that the federal reserved rights doctrine was necessary to prevent further Indian hostilities. The 1930 Federal Irrigation Water Rights Memorandum attached as an appendix to this brief explains just what it meant and means to the Department of Justice to have plenary authority over water from the reserved rights doctrine. The memorandum details using the war powers or plenary powers to assert federal jurisdiction to displace the constitutional powers that were supposed to be reserved to the States at statehood under the doctrine of federalism.

The decisions in *Kagama*, *Winans* and *Winters* stand in contradiction to this Court's decision defining the public trust doctrine as a matter of separation of

powers in *Lessee of Pollard v. Hagan*, 44 U.S. 212 (1845) and other old water cases. This Court must reconsider prior precedent that violates this critical role of protecting the constitutional structure to restore federalism as a major component of the separation of powers doctrine embodied in the Constitution. This Court took a huge step toward restoring federalism in *Murphy v. NCAA* this past term. Justice Alito in writing the opinion of the court opined that the doctrine of federalism is contradicted by granting Congress plenary authority. To apply the anticommandeering mandate of *Murphy* to this case requires an examination of the constitutionality of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371 (16 U.S.C. 3101 et seq.) before addressing whether the National Park Service regulation legally preempts state jurisdiction. *Amici* believe that the authority for ANILCA can be clarified by this Court to permit a proper look at the constitutionality of the federal regulation that is actually supplanting state jurisdiction.

Addressing the plenary authority of Congress over the Indians should also include a short explanation in the opinion that the Constitution applies to all Native Americans living on the reservations and the American citizens living in other territories like Guam and Puerto Rico. There needs to be further explanation that political accountability federalism is not the "States Rights" federalism that should have ended with the Civil War.

ARGUMENT

Amici CERF and CNYFBA realize that this case concerns the expansion of the federal reserved water rights doctrine in Alaska. No modification of the

reserved rights doctrine is enforceable when the DOJ asserts that it constitutionally exercises plenary war powers for its client, the entire federal government. In order for this Court to address the federal reserved rights doctrine it must kill the body of the beast not just the latest head to sprout from the manipulations of the DOJ to apply the plenary power. As the Federal Irrigation memo demonstrates any limitation against the claim of extending the reserved rights doctrine by this Court will simply come back again under a slightly different analysis. That is why this case is back before this Court. *Sturgeon v. Frost*, 136 S. Ct 1061 (2016). The only way to stop this is to restore the constitutional structure. Restoring the constitutional structure requires revoking the consent to the use of the plenary power. This case is the ideal vehicle for correcting the misuse of the plenary power.

I. PLENARY POWER ALLOWS WAR POWERS TO BE INTERMIXED AND USED AS AN ENUMERATED POWER

A. The 1871 Indian Policy

After the Civil War, Congress changed federal Indian policy. The 1871 policy ended treaty making with the Indian tribes. This formally ended the assimilation policy of the Northwest Ordinance and began a much harsher direct war power policy toward the Indians. See 25 U.S.C. § 71, 1 Rev. Stat. § 441 and § 442. *See also U.S. v. Lara*, 541 U.S. 193, 201 (2004). The Indian policy of 1871 was based on all Indians and Indian tribes as a race being potential belligerents against the authority of the United States. This change happened because so many Indian tribes raised

hostilities during the Civil War. Many Indian tribes formed alliances with the Confederate States. *See Holden v. Joy*, 112 U.S. 94 (1872). This codification of the Reconstruction power over Indians preserved the territorial war powers used to fight the Civil War and to Reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) p. 470-8. With the policy shift the Civil War ended and the Indian Wars began. Under the 1871 policy even if an Indian left the reservation of territorial land made for his tribe and resided in town as a member of American society, he was deemed to be under the complete authority of Congress as an undomesticated person not capable of exercising the responsibilities of a citizen. Only Congress could change his status and grant citizenship. *See Elk v. Wilkins*, 112 U.S. 94 (1884).

By the 1880's senior members of Congress were intentionally going around the 1871 Indian policy and trying to fulfill the promises that had been made to friendly Indian tribes under the original assimilation policy. *See Nebraska v. Parker*, 136 S.Ct. 1072 (2016). This attempt to return to the assimilation policy was incorporated into the Dawes or General Allotment Act of 1887. At the same time, many other members of Congress were more than hesitating to relinquish the essentially unlimited authority they possessed over Indians from the 1871 policy. This was the creation of the schizophrenic federal Indian policy that still exists today. This schizophrenic dual Indian policy created the basis of the plenary power this Court attributed to Congress in *United States v. Kagama*, 118 U.S. 375, 380 (1886). The reality is that from the beginning this Court knew the plenary power was actually the acquiescing of this Court to allowing war powers to apply intermixed with the enumerated federal powers of the

Constitution. "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell." *Kagama* at 384.

Just four years before *Kagama*, this Court refused to acquiesce to the war power being mixed with the Civil War amendments to create plenary authority in *United States v. Harris*, 106 U.S. 629 (1882). Similarly, the decision in *Ex Parte Crow Dog*, 109 U.S. 556 (1883) held the line on federal authority. Whatever the reason for the complete change of position of this Court the end result was that the constitutional constraints on federal authority were rendered unenforceable in any court of law. Many scholars today link the change of position to how the 1871 Indian policy started the Indian wars and then brought on an era of imperialism. See generally "How the Civil War Became the Indian Wars," New York Times Opinionator May 25, 2015 by Boyd Cothran and Ari Kelman, http://boydcothran.com/2015/05/27/how-the-civil-war-became-the-indian-wars/.

It was not only Congress that was beginning to relish this virtually unlimited authority over the Indians and explore new possibilities of applying it. According to the historical documents the United States Department of Justice with all of its attorneys was also seeing all the possibilities. When this Court acquiesced to Congress having plenary power it effectively gave the Executive branch the same unlimited authority. Every federal department and agency is represented by DOJ. DOJ always has senior counsel assigned whose role it is to advise Congress and to handle their specific inquiries. William H. Veeder himself held that role for DOJ from 1946-1952. During

his time as the DOJ liason to Congress he met and began working with Congressman Richard M. Nixon. DOJ also advises all departments and agencies on all constitutional law and jurisdictional regulations. In this case it is a National Park Service regulation, 36 C.F.R. 1.2(a)(1) and (3) that is the basis for claiming federal jurisdiction over the navigable waterway. This regulation may have been promulgated by the National Park Service but its jurisdictional reach and its defense are all controlled by the DOJ. When only one law firm represents all of the interests of the federal government a grant of authority to one part is going to apply to all of it, especially when the one law firm is itself a major part of the Executive branch. The DOJ advocates for its client and that includes every law passed by Congress and enforced by the Executive. It would violate its advocacy duty to its client if it chose to apply constitutional restraints not currently required by the law according to the federal courts.

As argued by the DOJ, there is no physical location anywhere within the territorial boundaries of the United States that is not subject to federal preemption if a Native American ever crossed over it when the federal government has plenary power. CERF has for many years been referring to this within our organization as the federal moccasin theory. Any place ever occupied or potentially used by Indians can be argued to be reserved to the United States. The DOJ strongly makes this argument in Federal Brief of Respondents in Opposition p. 3-4. On physical land this federal preemption is manifested by designating an area "Indian country." See generally 18 U.S.C. § 1151. This criminal statute incorporates the jurisdictional decision in *United States v. Kagama* that the Congress has plenary authority over Indians to uphold the

constitutionality of the Major Crimes Act that removed state jurisdiction over major crimes committed by Indians on federal land and Indian reservations. Not long after federal preemption was created on land the DOJ manipulated to create the federal reserved rights doctrine on water using an identical legal argument linked to the Indian treaties as federal statutes under federal plenary authority as decided in *Kagama*. *See United States v. Winans*, 198 U.S. 371 (1906). This was quickly followed by the claim that there was implied reservation of water when an Indian reservation was created that could displace state conferred private property water rights. *See Winters v. United States*, 207 U.S. 564 (1908).

In this case Mr. Sturgeon has argued that the issue is whether the National Park Service regulation claiming jurisdiction over the waterways in Alaska within the National Conservation Area (NCA) exceeds the authority of the National Park Service. But there is a preliminary question that raises the same jurisdictional question raised in *United States v. Kagama*, over the authority of Congress to legislate and claim exclusive federal jurisdiction over a federally reserved area within a sovereign state. The way the question has been presented in this case it assumes that Congress has the plenary authority to enact the ANILCA. Admittedly Congress enacted legislation that tried to protect the public trust responsibilities of Alaska in ANILCA. The DOJ has interpreted ANILCA as an assertion of the preemptive authority of Congress over the NCA's and advised the National Park Service that it has preemptive authority to promulgate the current regulation under the federal reserved water rights doctrine. This case cannot be resolved with an

enforceable decision by this Court without addressing the plenary authority of Congress over the Indians.[2]

B. The 1930 Federal Irrigation Water Rights Memorandum

It requires reading the memorandum on Federal Irrigation Water Rights attached to this brief as Appendix a to see just how the federal reserved rights doctrine is used by the DOJ to completely preempt state jurisdiction over water. It is important that this Court realize that the claimed federal authority is plenary and the reasoning to assert the plenary authority is infinitely flexible. Counsel reminds this Court that this is a Memorandum dated January 22, 1930 and that the United States undoubtedly claims more than this today. The reasoning in the 1930 memorandum is more detailed than the reasoning applied by the Ninth Circuit in this case. The difference is that the 1930 memorandum tries to justify or interpret how separate constitutional powers were combined to claim ownership of all water while the Ninth Circuit erroneously assumes that the Commerce Clause power always included these other constitutional powers.

Attorney Ethelbert Ward states that the federal reserved water rights doctrine was established when this Court opined that "Although this power of changing the common law rule as to the stream within its domain undoubtedly belongs to each State, yet two

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[2] The assertion of the plenary authority is the reason that the DOJ has refused to enforce *Carcieri v. Salazar*, 555 U.S. 379 (2009). According to DOJ there is always going to be an alternative interpretation of any law that is within their authority to make if it comes under their preemptive plenary authority.

limitations must be recognized: First, that in the absence of specific authority from Congress, a State by its legislation cannot destroy the right of the United States, as the owner of lands bordering on streams, to the continued flow of its water so far at least as may be necessary for the beneficial uses of the government property..." U.S. v. Rio Grande Dam and Irrigation Co., 174 U.S. 690, 703 (1899). Appendix at 13aa . This language is exactly the same as that found in *Kagama* to justify the use of plenary power. *Kagama* at 380.

This memorandum on Federal Irrigation Water Rights goes much further than just asserting these rights within federal irrigation projects. The first sentence "The United States is the owner of the unappropriated waters in the non-navigable streams in the public land States of the arid West." sets the stage. App. at 1aa. As just stated above, the United States claimed all of the unappropriated waters of the Rio Grande even though they had argued in this Court that the Rio Grande was a navigable river. But to claim all of the unappropriated waters according to this analysis the United States also had to be claiming that the Rio Grande was non-navigable. The Ward memorandum explains how the United States can use either argument navigable or non-navigable to gain the same results on federal reserved rights. "Even in the States where the appropriation system prevails, the United States continues to hold its land and waters as a riparian proprietor at common law." App. at 5aa.

In describing how to interpret the Act of 1866 Attorney Ward said: "By the Act of 1866, Congress made the State its agent by requiring compliance with 'local customs, laws and the decision of the courts' before the individual could acquire a right and title to the Government's unappropriated waters." App. at 9aa-

10aa (emphasis in original). Ward continued "The Supreme Court held in a well considered case that the provisions of the mining law, which are similar to the provisions in Sec. 9 concerning water rights, made in effect the States and Territories the agents of the United States to enact and enforce local rules under which, within the limits fixed by Congress, these mineral rights must be acquired and enjoyed. The same rule applies to the water provisions of the Act of 1866. The State acts as the agent of the United States. Butte City Water Co. v. Baker, 196 U.S. 119, 126." App. at 11aa. (Emphasis in original). Butte City says nothing about a State acting as an agent for Congress or the United States. The case could be construed as an early example of cooperative federalism.

The Ward memorandum sets out in exacting detail how the law and decisions by this Court through 1930 can be interpreted by the federal attorneys to further the federal reserved water rights doctrine. "The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied, and could not be. United States v. Rio Grande Ditch & Irrigation Co., 174 U.S. 690, 702; United States v. Winans, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. Winters v. United States, 207 U.S. 564, 577 (1908)." App. at 13aa. The Ward memorandum then continues into how Section 8 of the Reclamation Act of 1902 also does not change any of the claims to federal reserved water rights. App. at 16aa-17aa, 20aa. This interpretation of Section 8 is eerily similarly to how the Congressional safeguards in ANILCA are deemed irrelevant. Just as in the earlier cases the DOJ defends this latest expansion of the federal reserved rights

doctrine to this Court to receive its tacit approval that this latest expansion is now the law if Mr. Sturgeon loses.

The federal reserved water rights doctrine was developed to preempt the authority of the States and alter the constitutional structure using the plenary powers according to this 1930 memorandum.

II. IS THIS COURT READY TO IMPOSE THE CONSTITUTIONAL LIMITS ON FEDERAL AUTHORITY?

In *Murphy v. NCAA* the majority struck down as unconstitutional provisions in the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. §3701 et seq. passed some 30 plus years ago that purported to allow the Congress to prohibit state legislatures from legalizing off site sports betting within their respective States. The reasoning of the majority was taken from the federalism argument adopted by the Rehnquist Court in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). The *Murphy* Court changed the prohibition against compelling or coercing a state to administer a federal program into a more defined line—the Congress has no power to commandeer any state legislative function that it cannot federally preempt using a direct authority granted to it under the federal Constitution. "The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States." *Murphy* at 1475. Justice Alito spent considerable effort defining appropriate federal

preemption in the majority opinion, "the legislative powers granted to Congress are sizable but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority." *Murphy* at 1476.

The anticommandeering doctrine has the potential to be more enforceable than the old equal footing doctrine. The equal footing doctrine relied on the requirement to dispose of the territory and create new States in the Property Clause, Art. IV, Sec. 3, Cl. 2. The United States was allowed to retain territorial land only on a temporary basis in a case that determined that States owned the bed and banks of a navigable waterway. *See Lessee of Pollard v. Hagan*, 44 U.S. (3 How.) 212, 221 (1845). The specific requirements set in that case became known as the American public trust doctrine. The main concept was that the federal government could exercise plenary power over a territory but that upon the formal creation of the territory by Congress certain powers and ownership over the water would vest in the future state. This insured that all States would be admitted on an equal footing with the existing states. Before the Civil War Amendments and the end of slavery this was the only way to enforce the Framer's view that all people had to be equal before the law. When this Court acquiesced to Congress having continuing plenary authority over Indians, it nullified the equal footing doctrine because

Congress no longer had to dispose of any federal territory, it could retain all federal territory indefinitely. This completely contradicts the bedrock principle "that each State is entitled to the sovereignty and jurisdiction over all territory within her limits." Lessee of Pollard v. Hagan, 3 How. 212, 228 (1845).

The main principal of the anticommandeering doctrine is that neither the Congress or any part of the national government has the authority to require a State or State official to act as an agent of the United States to enforce a federal law. *Murphy* at 1476-1477. As stated in the Federal Irrigation Water Rights memorandum the plenary authority flips the primary ownership of the water from state to federal and converts the state laws on acquiring a water right into laws passed as agents of the United States to comport to federal laws. This is much more than claiming a federal reserved right for a particular purpose. This is the deliberate destruction of the dual sovereignty role of the states as defined in *Lessee of Pollard*. The use of the plenary power to create the federal reserved water rights doctrine to destroy state legislative jurisdiction over property that is supposed to belong to the State must violate the anticommandeering doctrine.

This case is again before this Court because the territorial sovereignty of Alaska has been commandeered. As explained above, the commandeering of state legislative jurisdiction is really coming from the assumption by Congress that it could dictate the terms of Alaska's land use after Alaska was granted statehood in passing ANILCA. If this Court chooses to declare parts of ANILCA unconstitutional for exceeding the authority of Congress it would still have to give Congress some time to dispose of the federal territory as required by the Property Clause.

Congress did many things right in the way it went about writing and passing ANILCA in including State officials in the discussion of the bill. ANILCA could be interpreted as a temporary law to manage the federal territories until they are formally disposed. If ANILCA is a temporary law to prevent misuse of the federal public land it does not require the plenary authority to be constitutional. Congress has authority to protect the remaining federal public land and can do so in a coordinated manner with the State of Alaska. Political accountability federalism does not cancel out cooperative federalism as long as the state legislative functions are not commandeered.

This reinterpretation of ANILCA would make the National Park Service regulation *ultra vires* in Alaska and throughout the United States. If Congress does not have plenary authority then neither does the Executive branch. If there is no authority to promulgate the regulation it cannot preempt state jurisdiction. Such a ruling would implicate the federal reserved water rights doctrine but would not require an immediate overruling of *Winters* and *Winans*. Congress could attempt to pass legislation that federal reserved water rights are based on the Indian Commerce Clause. There is no reason for the Court to guess at how Congress will react. It can allow the law to be adjusted incrementally as the cases and controversies arise.

III. IF THIS COURT APPLIES *MURPHY v. NCAA* TO RESOLVE THIS CASE IT SHOULD ADDRESS THE LEGAL STATUS OF THE INDIANS IN THE OPINION

For more than 20 years the Citizens Equal Rights Foundation (CERF) has been presenting *amici curiae* briefs to this Court requesting that this Court reexamine its prior cases granting plenary authority to the Congress and Executive branch over Indians under current federal Indian policy. In the last three terms, in several opinions regarding Puerto Rico and water law this Court has called into question the continuing plenary authority of the United States over federal territory. One of those cases was the earlier version of this case. The Chief Justice himself warned the Ninth Circuit Court of Appeals in the unanimous opinion that further expanding the federal reserved water rights doctrine would have great implications but did not articulate what those implications would be. The Ninth Circuit upon rehearing chose to ignore the warning and has greatly expanded the federal reserved water rights doctrine to now include full plenary authority under the Commerce Clause. Now this Court must either capitulate to this end of the state public trust doctrine over water as the Ninth Circuit has defined it or confront the claimed federal plenary authority over Indians that has expanded to this point. There is no place left in the Ninth Circuit decision for any claim of state sovereignty over water in Alaska if the reasoning of the Ninth Circuit stands.

In the *amici curiae* brief at the petition stage these *amici* raised the issue of how the plenary power has allowed the Congress to change the citizenship status of any American and cited to the cases that

allowed Japanese citizens to be legally detained during World War II. The 1871 Indian policy was justified and upheld in principle in *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944) and applied to all persons of Japanese ancestry. This thinking is as crazy as believing that the federal Indian policy of 1871 that still underlies current federal Indian policy was defined and designed to help the Indians. As William Veeder himself found out, nothing is further from the truth. Native American citizens living on federal Indian reservations still have no constitutional rights. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). If this Court applies the new federalism to end the plenary power of Congress and begins to restore state sovereignty it needs to also address the fact that without the plenary power that no branch of the United States government has the authority to continue to treat Native Americans or the citizens of our other territories in Guam and Puerto Rico as second class citizens. This Court should hold that all persons living within the boundaries of the United States are entitled to the same rights under the Constitution of the United States. Restoring the constitutional structure makes the federal government and this Court politically accountable to the people. It also restores the liberty interest of Mr. Sturgeon and begins restoring the concept of liberty for all Americans.

Political accountability federalism is not a "States Rights" argument to bring back a mode of thinking that should have ended with the Civil War. Political accountability federalism is based on a constitutional structure designed by the Framers that integrated two systems of government to prevent either government from gaining too much power and

threaten self government of the people. The original accountability federalism argument was developed using a model of the constitutional structure as a simple electronic integrated circuit. The reason this is important is that the modern integrated circuit was not invented until 1968 in Silicon Valley where the original author grew up. The integrated circuit is the building block of the electronic age that has so changed our world and brings such huge innovations. The Constitution may be over two hundred years old but if restored to its original structural design by removing the plenary power short circuit it is still as viable as it was when written. Maybe more viable because we now have the electronic verbiage to explain how and why it works.

CONCLUSION

This Court should reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,
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MEMORANDUM

FEDERAL IRRIGATION WATER RIGHTS

by

ETHELBERT WARD, January 22, 1930.

The United States is the owner of the unappropriated waters in the non-navigable streams in the public land States of the arid West. This means, for practical purposes, in part, as follows:

1. The United States prescribes the method by which the right to use such unappropriated waters may be acquired.

2. The United States may reserve from further appropriation so much of such unappropriated waters as may thereafter be needed for irrigation uses upon an Indian reservation.

3. The United States may reserve from further appropriation so much of such unappropriated waters as may thereafter be needed for irrigation uses upon the Government's Reclamation Project.

The United States originally owned all the lands in the arid West as a common law proprietor as well as a sovereign proprietor. At the English common law the sovereign owned and controlled the beds of navigable tide waters, while the beds and waters of non-navigable (fresh water) streams were owned and controlled by the proprietor of the lands through which such streams ran. The term "fresh water" used in the common law referred to streams where the tide did not flow; and in England were all non-navigable. The Supreme Court of the United States has extended the common law rule of

navigable tide water to navigable fresh water streams such as the Mississippi and Columbia Rivers.

Shively v. Bowlby, 152 U. S. 1, 13-15.

At common law the waters of a non-navigable (fresh water) stream belong to the owners of the riparian lands.

> Fresh waters of what kind soever do of common right belong to the owners of the soil adjacent; so that the owners of the one side have of common right the propriety of the soil usque filium aquae, and the owners of the other side the right of soil or ownership unto the filium aquae on their side. And if a man be owner of the land on both sides, in common presumption he is the owner of the whole river according to the extent of his land in length.

Hale's De Jure Maris, Chap. 1.

When the Western States were admitted into the Union these states acquired all the sovereign rights of the English Crown theretofore possessed by the United States, except such sovereign rights as were retained by the United States under the Constitution.

> For when the revolution took place, the people of each States became themselves sovereigns; and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by

the Constitution to the general Government.

Martin v. Waddell, 16 Pet. 367, 410.

Shively v. Bowlby, 150 U. S. 1, 14-15

One of the sovereign rights acquired by the new States was the title and control of the beds of navigable waters, subject to the Federal paramount navigation control. The new States did not acquire any ownership in the waters of non-navigable (fresh water) streams because that was not a sovereign right of the English Crown. Such waters belong to the proprietor of the riparian lands. That proprietor was the United States.

Hale's De Jure Maris, Chap. 1.

The Supreme Court of the States of New York, one of the original thirteen States, holds:

> "Fresh rivers of what kind soever do of Common right belong to the owners of the soil adjacent", is the expressive language of the common law and is of universal application.
>
> Smith v. Rochester, 92 N. Y. 463, 473.

The Supreme Court of Massachusetts, another one of the thirteen original States, holds:

> It is to be noticed, first that the nature of their ownership on the border of tidewater differs from the ownership of a riparian proprietor upon an innavigable river or small stream. The title of the owner in the latter case goes to the thread

> of the stream, he owns all of the land under the water with a right to the flow of the water which goes with the land as a part of the real estate included in his ownership. The State has no ownership of any part of these small streams, nor any control over them except such as it has in all parts of its domain for governmental purposes.
>
> Home for Aged Women v. Commonwealth, 202 Mass. 422,

Some of the State courts in the arid West seem to think that irrigation was unknown or impossible at common law, and that a riparian proprietor had no right to use the water of a stream for irrigation, because, according to their ideas of the common law, the riparian proprietor must let the water flow past his lands unpolluted in quality and undiminished in quantity.

For instance, the Supreme Court of Colorado says:

> A riparian proprietor, owning both sides of a stream, may divert water therefrom, providing that he returns the same to the natural stream before it leaves his own land so that it may reach the riparian proprietor below without material diminution in quantity, quality or force.
>
> Oppenlander v. Ditch Co., 18 Colo. 142, 148.

It is suggested on behalf of the appellants that the use of water for

irrigation was practically unknown to the common law. But, while it may be true that it is seldom necessary or desirable to irrigate land in England by artificial means, yet it appears that a reasonable use of running streams for the purpose by riparian proprietors is recognized by the Courts of that county. It is expressly so stated in Gould on Waters, where a number of English cases are cited; and in Pomeroy on Riparian Rights it is declared that the common law rule that every proprietor has an equal right to the use of water as it is accustomed to flow, without diminution or alteration is subject to well-recognized limits that each owner may make reasonable use of the water for domestic, agricultural and manufacturing purposes; and the author there cites several English and American decisions in support of that declaration.

Benton v. Johncox, 17 Wash. 277, 289.

Gould on Waters, Sec. 217.

Pomeroy on Riparian Rights, Sec. 125.

Wiel on Water Rights (3rd Ed.) 807, 815, 818, 819.

Jones v. Conn, 39 Ore., 30, 36.

Clark v. Allaman, 71 Kans. 206, 241.

Even in the States where the appropriation system prevails, the United States continues to hold its land and waters as a riparian proprietor at common law.

> Although this power of changing the common law rule as to the stream within its domain undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress, a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on streams, to the continued flow of its water so far at least as may be necessary for the beneficial uses of the government property****
>
> U. S. v. Rio Grande Irr. Co., 174 U. S. 690, 703.
>
> Gutierrez v. Albuquerque Co., 188 U. S. 545, 554.
>
> The Congress shall have power to dispose of and make all needful rules and regulations regarding the Territory or other property belonging to the United States.
>
> U. S. Constitution. Art. IV, Sect. 3, Par. 2.

In about 1836, it seems that the State of Illinois conceived the notion that the United States held the public lands in the Northwestern territory solely in trust for the State; that the words of the Constitution, "to dispose of" meant only to sell; and that the future state had some sort of a claim or interest in the

minerals in the public lands which prevented the United States from reserving or leasing such mineral lands. The Supreme Court held that the term "territory" in the Constitution meant lands, and that words "to dispose of" meant to reserve, lease, sell, or otherwise handle without let or hindrance.

> U.S. v. Gratiot, 14 Pet. 526, 537-8, (Decided in 1840).

This early case is interesting in view of the claims now made by the Western States that the United States held the waters of non-navigable streams in trust for the future state, and that the ownership of such waters went to the States.

The exclusive Constitutional power of Congress to dispose of the public domain and other property of the United States has been upheld time and again by the Supreme Court.

> No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.
>
> Gibson v. Ghouteau. 13 Wall. 92, 99.

These are rights incident to a proprietor, to say nothing of the power of the United States as a sovereign over the property belonging to it.

Light v. U. S. 220 U.S. 523, 537.

Prior to the Mexican war, and for some years thereafter, the appropriation system, regardless of ownership of riparian lands, was practically unknown in the United States. During that period riparian rights attached both to privately owned lands and to the public lands of the United States. Congress, as early as May 18, 1796, recognized this right by enacting

> That all navigable rivers within the territory to be disposed of by virtue of this Act, shall be deemed to be and remain public highways and that in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall become common to both.

Act of May 18, 1796, 1 Stat. 468.

The above Act applied to lands in the Northwest Territory. Later Congress enacted what is now Revised Statutes, Sec. 2476, where the rule is extended to all public lands.

As non-riparian settlers in California and elsewhere in the West had for a number of years appropriated the public waters of the United States, regardless of the riparian proprietary rights of the United States, and vast mining and agricultural interests were dependent thereon, Congress gave relief by passing the Mining and Water Act of July 26, 1866 (14 Stat. 451). This Act ratified and validated prior appropriations and provided a method by which such rights could in the future be acquired from the United States. Sec. 9 of that Act provides:

> That whenever by priority of possession, rights to the use of water for mining, agriculture, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same ***
>
> Act of July 26, 1866, Sec. 9 (14 Stat. 451)

Section 17 of the Act of 1870, amends and interprets Section 9 of the Act of 1866, as follows:

> *** and all patents granted, or preemption of homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may be acquired under or recognized by the ninth section of the Act of which this Act is amendatory ***
>
> Act of July 9, 1870, Sec. 17 (16 Stat. 217)

Without citing the numerous court decisions which discuss the meaning of this Act, it is sufficient to state that Congress thereby provided the way by which persons should in the future acquire the right and title to use the unappropriated waters of the United States flowing upon its public lands. The Act is prospective in its operation.

Jacob v. Lorenz, 98 Calif. 332, 335-6.

Beaver Brook Co. v. St. Vrain, 6 Colo. App. 130, 138.

By the Act of 1866, Congress made the State its agent by requiring compliance with "local customs, laws and the decisions of courts" before the individual could acquire a right and title to the Government's unappropriated waters. The United States have never granted its waters to any State. The unappropriated waters, or the waters that have not been granted by the United States still belong to the United States.

> The waters in question were a part of an innavgable stream, the title to which was never acquired by any State, but remained in the Federal Government.

Anderson v. Bassman, 140 Fed. 14, 20.

> The water in an innavigable stream flowing over the public domain is a part thereof, and the national Government can sell or grant the same, or the use thereof, separate from the rest of the estate under such conditions as may seem to it proper.

Howell v. Johnson, 89 Fed. 556, 558.

> As the United States then owns the waters which are incident to its lands, it dispose of them separate from its lands if it chooses.

Cruse v. McCauley, 96 Fed. 369, 374.

> It was apparent to Congress, and indeed to everyone, that neither the local customs nor State laws nor decisions of State courts could vest the title to public land and waters in private individuals without the sanction of the owner, viz: the United States.
>
> Benton v. Johncox, 17 Wash. 277, 289.

It will be noted that the Act of 1866 refers principally to mining, and that the same provisions are inserted in that Act regarding compliance with local customs, laws and the decisions of courts before mining rights could be acquired. The Supreme Court held in a well-considered case that the provisions of the mining law, which are similar to the provisions in Sec. 9 concerning water rights, made in effect the states and Territories the agents of the United States to enact and enforce local rules under which, within the limits fixed by Congress, these mineral rights must be acquired and enjoyed. The same rule applies to the water provisions of the Act of 1866. The State acts as the agent of the United States.

> Butte City Water Co. v. Baker, 196 U.S. 119,126

It will be noticed that the Act of 1866 provides for the issue of a patent by the United States for the mining claim, if the locator desires a patent; or the locator can hold the claim under possessory rights. No provision is made for the issuance of a patent for a water right. Congress evidently thought it wiser to grant a possessory right to the use of the water so long as the claimant complied with "local customs, laws and

decisions of courts". The Act of 1866 is the claimant's title deed to water. The grant is in the Act itself, the highest kind of a patent.

> A water right can, therefore, be acquired only by the grant, express or implied, of the owner of the lands and water. The right acquired by appropriation and use of the water on the public domain is founded on the grant from the United States as the owner of the land and water. Such grant has been made by Congress.
>
> Smith v. Denniff, 24 Mont. 20, 21.
>
> Union Co. v. Ferris, 2 Sawyer 176, 184.

In appropriation States the United States still holds its undisposed of waters as a riparian proprietor regardless of State laws. The Supreme Court says:

> Although this power of changing the common law rule as to the streams within is domain undoubtedly belongs to each state, yet two limitations must be recognized: First, that in the absence of specific authority from Congress, a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on streams, to the continued flow of its waters so far at least as may be necessary for the beneficial uses of the Government property***
>
> U.S. v. Rio Grande Irr. Co., 174 U.S. 690, 703.

Gutierrez v. Albuqueque Co., 188 U.S. 545, 554.

INDIAN RESERVATIONS.

By the establishment of an Indian Reservation the United States, as the owner of the unappropriated waters in the adjacent non-navigable streams, reserves from further appropriation so much of such waters as will in the future be needed for the lands of the reservation.

> The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied and could not be. United States v. Rio Grande Ditch & Irrigation Co., 174 U.S. 690, 702; United States v. Winans, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years.
>
> Winters v. U.S., 207 U.S. 564, 577.

The Federal decisions on the water rights of the United States for the Indian reservations are the following:

1901. U.S. v. Morrison, 203 Fed. 364 (Colo.)

1906. Winters v. U.S., 143 Fed. 740 (Mont.)

1906. Winters v. U.S., 148 Fed. 684 (Mont.)

1907. U.S. v. Conrad, 156 Fed. 123 (Mont.)

1908. Winters v. U.S., 207 U.S. 564 (Mont.)

1908. Conrad v. U.S., 161 Fed. 829 (Mont.)

1918. U.S. v. Wightman, 230 Fed. 277 (Ariz.)

1922. Skeem v. U.S., 273 Fed. 93 (Idaho)

1926. U.S. v. Parkins, 18 F (2d) 642 (Wyo.)

1928. U.S. v. Hibner, 27 F (2d) 909 (Idaho)

U. S. District Judge Hallett of Colorado held in 1901:

> The Acts of Congress and of the State Assembly relating to appropriation of Water for irrigating lands were made for and are applicable only to cases arising between citizens. They have no application whatever to the case in which water is appropriated to a public use by the Government in the exercise of its sovereign authority over the Indian tribes.

U.S. v. Morrison, 203 Fed. 364, 366.

RECLAMATION PROJECTS.

Act of July 2,1902 (32 Stat. 388).

The same rights and powers of the Unites, upon which the Winters case is based, apply to the reservation of waters for the Government's reclamation

projects. It seems that only one case is found in the printed reports of Federal decisions which announces the rule above stated as applicable to the Government's reclamation projects. This was one of Mr. B. E. Stoutemyer's early cases decided in 1910. That opinion is by the United States Circuit Court of Appeals, 9th Circuit. It says:

> That the United States may, where the circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular beneficial purpose, was held by this court in Winters v. United States, 143 Fed. 740, and 148 Fed. 684. This decision was affirmed by the Supreme Court of the United States in Winters v. United States, 207 U.S. 564, 577, where the Court said:
>
> "The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied and could not be. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702; U.S. v. Winans, 198 U.S. 371."
>
> To the same effect was the decision of this Court in Conrad Inv. Co. v. U.S., 161 Fed. 829, 831.
>
> Burley v. U.S., 179 Fed. 1, 12.

It seems that the authorities cited in this memorandum, relating to the ownership by the United States of the unapproprated waters in the non-navigable streams and its power to reserve the same

for beneficial Governmental purposes, are sufficient to establish the proprietary and sovereign rights of the United States. I shall, therefore, not repeat those decisions here.

Judge Cavender of the State District Court of Colorado held in 1912 for the Government's Grand Valley Project, and again in 1913 for the Government's Uncompahgre Project, that the United States owned the unappropriated waters of the non-navigable streams in Colorado, and by establishing a reclamation project had reserved so much of said unappropriated waters as were needed for the project. Following these decisions the Attorney General announced his approval of the doctrine in his Annual Report for 1914, at page 39.

Special Master George F. Talbot of the United States District Court of Nevada has announced the same rule. See his Explanatory Report in the case of U.S. v. Orr Water Ditch Co., Departmental File No. 182979. The decree prepared by him enforcing this right of the Government has been temporarily enforced during the past four years by the United States Judge of Nevada.

Section 8 of the Reclamation Act.

Counsel opposing the Government's water rights always rely upon Section 8 of the Reclamation Act as a relinguishment of the Government's proprietary and sovereign rights over its waters and as a mandatory compliance by the United States at its peril with State water laws. The pertinent portions of Sec. 8 are as follows:

> Sec. 8: That nothing in this Act shall be construed as affecting or

> intending to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired there under, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator or user of water in, to, or from any interstate stream or the waters thereof***.
>
> Act of July 2, 1902, Sec. 8 (52 Stat. 388, 390.)

The first part of Section is a re-affirmance of the Government's guaranteed protection of the water rights recognized and validated by the Act of 1866, and water rights thereafter to be acquired from the United States under the provisions of Section 9 of the Act of 1866 by conformity with "the local customs, laws and decisions of courts."

The Secretary of the Interior, in carrying out the provisions of the Reclamation Act is directed to conform with the State water laws provided that such conformity shall not in any way affect any right of the Federal Government.

There are many proprietary, constitutional and sovereign rights of the Federal Government that would be seriously affected by strict conformity with State water laws and the rules and regulations of States

Engineers—such as appropriation permits and time limits for completion of works and application of water.

For illustration, the first requirement of the laws of most of the appropriation States is that the prospective user must obtain a permit to "appropriate" the desired water. An "appropriation" of water means the taking of the steps required by the "local customs, laws and the decisions of courts" of the State, by which the title to the right to use the water—a real property right—vests from the Federal Government to the individual—"whereby the appropriator is granted by the Government the exclusive use of the water."

Monte Vista v. Centenial Ditch Co., 22 Colo. App. 364, 370.

There is no need that the Government should appropriate or acquire title to that which it already owns, viz: the inappropriated waters which, by the establishment of a reclamation project, the Government reserves for the uses of its reclamation project.

> The Government has not to make a prior appropriation to enable it to obtain the use of the waters. It has only to take that which has been reserved or that which has never been subject to prior appropriation upon the public domain. It has only to come into its own when its needs may require—the Department of the Interior being the instrumentality by which it exercises that right and privilege—and all persons seeking appropriations from public streams must take subject to this paramount right.

U.S. v. Conrad Inv. Co., 156 Fed. 123, 129-130.

> It was, therefore, unnecessary for the Government to appropriate the water. It owned it already. All it had to do as to take and use it.

Story v. Wolverton, 31 Mont. 346, 353.

Winters v. United States, 143 Fed. 740, 747.

Section 8, in excepting conformity which will interfere with State rights or with Federal rights or with interstate stream rights, states these exceptions in the disjunctive. Separately stating these exceptions, we have:

1. Nothing herein shall affect any right of any State.

2. Nothing herein shall affect any right of the Federal Government.

3. Nothing herein shall affect any right of any land owner, appropriator, or user of water in, to, or from any interstate stream, or the waters thereof ****.

The Supreme Court of the United States has interpreted the language excepting interstate stream rights.

> Congress was solicitous that all questions respecting interstate streams thought to be involved in that litigation (Kans. V. Colo.) should be left to judicial determination unaffected by the Act,—in other words, that the matter be left just

as it was before. The words aptly reflect that purpose.

Wyo. v. Colo. 259 U.S. 419, 463.

Applying the same interpretation to the language excepting the rights of the Federal Government from the conformity provisions of Section 8, the Court undoubtedly would hold that Congress was solicitous that all questions regarding any rights of the Federal Government be left just as they were before the enactment of Section 8; and that the words "nothing herein shall in any way affect any right of the Federal Government" would aptly reflect that purpose.

We call attention to the numerous decisions regarding conformity with State laws as found in the Conformity Act in Revised Statutes, Sec. 914, and the Eminent Domain Act, Aug. 1, 1888 (25 Stat. 357).

I call special attention to the decision of Judge Lewis, now presiding judge for the 10th Circuit, in the case of U. S. v. O'Neill, 198 Fed. 677, 682-3, and the cases cited by him, especially the case of Hills & Co. v. Hoover, 220 U.S. 329, 336, and the decisions there cited. These decisions are to the effect that conformity with State law is not required where any right of the Federal Government is impaired thereby.

It, therefore, is evident that the conformity provisions of Section 8 are not mandatory, but merely directory and modal, provided that such compliance does not in any way affect any right of the Federal Government.

In actual practice, the Reclamation Service does "conform" with State laws in every way possible in

order to give notice to all of the water requirements of the Government for its projects.

Respectfully submitted,
(Sgd) Etherlbert Ward
Special Assistant to the Attorney General

Denver, Colorado,
January 22, 1930.

No. 17-949

In The Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* STATES OF ARIZONA, ARKANSAS, IDAHO, INDIANA, NEBRASKA, NEVADA, SOUTH CAROLINA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

The States of Arizona, Arkansas, Idaho, Indiana, Nebraska, Nevada, South Carolina, Wisconsin, and Wyoming (collectively "*amici* States") appear in support of reversing the Ninth Circuit's decision holding that the Nation River is "public land" under the Alaska National Interest Lands Conservation Act (ANILCA) by virtue of the United States holding an implied federally-reserved water right. The *amici* States file this brief pursuant to Supreme Court Rule 34.4, providing that "[n]o motion for leave to file an *amicus curiae* brief is necessary if the brief is presented . . . on behalf of a State . . . when submitted by its Attorney General."

This case implicates the preemption of a state's authority over its navigable waters. *Amici* States are concerned with the Ninth Circuit's failure to apply the clear statement doctrine, which requires courts to presume that Congress did not intend to supersede state authority in areas traditionally regulated by states unless such intent is clearly manifested. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 172-74 (2001); *United States v. Bass*, 404 U.S. 336, 349 (1971). Ignoring the directions of the clear statement doctrine, the Ninth Circuit divested a state of its traditional authority over its navigable waters based on an unprecedented expansion of the implied-reservation-of-water doctrine.

The *amici* States, many of which include large swaths of federal land, have an interest in the correct application of the implied-reservation-of-water

doctrine.[1] In these States, reserved water rights have had, and will continue to have, a large impact on both the States and private water users. *See United States v. New Mexico*, 438 U.S. 696, 699 (1978). Of upmost concern to the *amici* States is the Ninth Circuit's novel expansion of the implied-reservation-of-water doctrine as a basis to justify increasing the National Park Service's authority over state-owned navigable waters. That concern is compounded by the Ninth Circuit's failure to apply this Court's established precedent and limit the United States' claimed reserved water right to "the amount of water necessary to fulfill the purposes of the reservation, no more." *Id.* at 700.

Although the discrete issue before the Court is the interpretation of "public lands" under ANILCA, whether a state-owned navigable river qualifies as "public land," touches "on vital issues of state sovereignty." *Sturgeon v. Frost*, ___ U.S. ___, 136 S. Ct. 1061, 1072 (2016). Moreover, the Ninth Circuit's interpretation of "public lands" under ANILCA could potentially be far reaching, as similar provisions are found throughout Title 16 of the United States Code.[2] The *amici* States are concerned that the Ninth Circuit's decision, if upheld, may be treated as a springboard for

---

[1] In the *amici* States, the following percent of land is federally owned: Arizona (38.7%), Arkansas (12.6%), Idaho (61.6%), Indiana (1.7%), Nebraska (1.1%), Nevada (79.6%), South Carolina (4.7%), Wisconsin (5.1%), and Wyoming (48.4%). Carol Hardy Vincent et al., Cong. Research Serv., R42346, *Federal Land Ownership: Overview and Data* 7-9 (2017).

[2] *See, e.g.*, 16 U.S.C. §§ 45f(b)(1), 90, 121, 228b(a), 410ff-1(a), 410mm-2(b), 460q-2, 460aa-7, 460bb-3(a), 460kk(c)(1), 1609.

the expansion of federal control over state-owned navigable waters throughout the country.

SUMMARY OF THE ARGUMENT

This case implicates the careful balance between federal and state authority over navigable waters. *Amici* States file this brief in support of reversing the Ninth Circuit's decision to divest the State of Alaska of its traditional regulatory authority over the Nation River, a navigable waterway, based solely on the United States' ownership of an implied federally-reserved water right. In order to reach this result, the Ninth Circuit went beyond analyzing the clear and manifest intent of Congress in enacting ANILCA, instead mutating a reserved water right into a vehicle to impart "title" over a state-owned navigable waterway. Moreover, the Ninth Circuit never conducted the careful examination required by this Court to determine whether the United States in fact owns a reserved water right on the Nation River. Rather, the Ninth Circuit allowed federal administrative agencies to designate which navigable waters the United States may seek to enforce an implied federally-reserved water right sometime in the future. The court then treated that designation as conclusive of the issue. The Ninth Circuit's decision is simply out of line with this Court's precedent and misconstrued the nature of reserved water rights. For those reasons, the decision should be reversed.

ARGUMENT

A. The Ninth Circuit Failed to Properly Apply the Clear Statement Doctrine.

The Ninth Circuit concluded that in enacting ANILCA Congress did not intend to preempt state authority over navigable waters under its navigable servitude or Commerce Clause authority. *Sturgeon v. Frost*, 872 F.3d 927, 933 (9th Cir. 2017). However, it went on to conclude that the Park Service regulations nevertheless preempt state law in waters in which the United States owns an implied federally-reserved water right. *Id.* at 934-36. In reaching this conclusion, the Ninth Circuit relied heavily on its decisions in *Katie John I* and *Katie John III*, where the court gave complete deference to administrative agencies' interpretation of "public lands" to include navigable waters in which those agencies decided the United States owned a reserved water right. *Id.* at 933-34; *Alaska v. Babbitt (Katie John I)*, 72 F.3d 698, 703-04 (9th Cir. 1995) ("we hold to be reasonable the federal agencies' conclusion that the definition of public lands includes those navigable waters in which the United States had an interest by virtue of the reserved water rights doctrine"); *John v. United States (Katie John III)*, 720 F.3d 1214, 1245 (9th Cir. 2013) ("it was reasonable for the Secretaries to decide that: the 'public lands' subject to ANILCA's rural subsistence priority include the waters within and adjacent to federal reservations"). The *amici* States disagree with the approach applied by the Ninth Circuit and believe that the court erred in

deferring to the administrative agencies' interpretation of "public lands."

"Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* (quoting *Bass*, 404 U.S. at 349). This Court has instructed that a statute should not be read to preempt the historic powers of the States absent a clear and manifest intent, even in the face of a contrary administrative interpretation.

"Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. "This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173.

The Park Service appears to argue that the clear statement doctrine should not apply because States only own the submerged lands, not the water, in navigable waterways. Br. for the Resp'ts in Opp'n at 12-14. The Ninth Circuit also appears to have taken this approach, concluding that while the States have an interest in submerged lands under navigable waterways, "lands submerged beneath inland waterways are distinct from the waterways themselves." *Sturgeon*, 872 F.3d at 933. The Ninth Circuit, however, does not explain why this distinction matters, and it is directly contrary to this Court's holding that "[o]wnership of submerged lands . . . carries with it the power to control navigation, fishing, and other public uses of water." *United States v. Alaska*, 521 U.S. 1, 5 (1997). The traditional authority of the States to regulate activity occurring on navigable waters arises from the States' ownership of submerged lands—not from ownership of the water itself.

As the Ninth Circuit recognized, under the Submerged Lands Act, 43 U.S.C. §§ 1301-1356b, and the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 343 (1958), Alaska secured all right and title to lands beneath navigable waters within its boundaries "and the natural resources within such lands and waters." *Sturgeon*, 872 F.3d at 932 (quoting 43 U.S.C. § 1311(a)). Those rights were also conferred under the equal-footing doctrine, whereby "[u]pon statehood, the State gains title within its borders to the beds of waters then navigable." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012). States are entitled to "allocate and

govern those lands according to state law subject only to 'the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.'" *Id.* (quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935)). "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged." *Oregon*, 295 U.S. at 14.

The Park Service relies on this Court's decision in *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954), where this Court stated that "[n]either sovereign nor subject can acquire anything more than a mere usufructuary right" in water because water can never become "the subject of fixed appropriation or exclusive dominion." Br. for the Resp'ts in Opp'n at 14. According to the Park Service, the States do not have traditional authority over navigable waterways because the States cannot "own" the water. *Id.* Additionally, the Park Service appears to argue that the States do not have traditional regulatory authority over navigable waters because that authority is subject to the federal government's authority under the navigable servitude. *Id.* at 12. These arguments largely parallel arguments this Court has considered and rejected when addressing the States' traditional authority over wildlife.

This Court has stated that "it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these

creatures until they are reduced to possession by skillful capture." *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 284 (1977). Although this Court concluded that States do not "own" wildlife in an exclusive or absolute sense, it still recognized "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Id.* Moreover, the Court continued to recognize the States' police power over wildlife even though wildlife was subject to federal regulation in some circumstances. "The fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence." *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371, 386 (1978).

Likewise, water is a critical resource, and this Court has long recognized the States' authority to regulate the use of water within their borders. "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978). This deference is cemented in the Submerged Lands Act, stating that the Act shall not be construed as in "any way interfer[ing] with or modify[ing] the laws of the States . . . relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters

shall continue to be in accordance with the laws of such States." 43 U.S.C. § 1311(e). This Court even recently applied the clear statement doctrine and declined to adopt an administrative interpretation of the Clean Water Act where it "would result in a significant impingement of the States' traditional and primary power over land *and water use*." *SWANCC*, 531 U.S.C. at 174 (emphasis added).

The Ninth Circuit erred in concluding that States do not have traditional regulatory authority over navigable waters because they do not "own" the water. The States have traditional authority to regulate activity on navigable waters based on their ownership of the submerged lands thereunder. *Alaska*, 521 U.S. at 5. Additionally, the Ninth Circuit's decision is out of line with this Court's recognition of the States' primary authority over water management and use. *SWANCC*, 531 U.S.C. at 174; *California*, 438 U.S. 645.

Interpreting "public lands" to include navigable waters in which the United States owns an implied federally-reserved water right would result in a significant impingement of the States' traditional authority over navigable waters within their borders. Such a result should not be reached unless Congress clearly manifested an intent to exercise its authority under the navigable servitude and the Commerce Clause to preempt state law. As the Ninth Circuit concluded, in enacting ANILCA, Congress did not intend to exercise this authority. *Sturgeon*, 872 F.3d at 933. Under the clear statement doctrine, the Ninth Circuit's analysis should have ended there.

B. The Ninth Circuit Failed to Conduct the "Careful Examination" Necessary to Determine Whether and to What Extent the United States Held an Implied Federally-Reserved Water Right in the Nation River.

The conclusion that the United States holds an implied federally-reserved water right in the Nation River is the crux of the Ninth Circuit's decision. However, the Ninth Circuit gave that determination little attention, resolving this bedrock factual issue based on generalizations and assumptions, rather than conducting the careful examination required under this Court's precedents.

"In determining whether there is a federally-reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water." *Cappaert v. United States*, 426 U.S. 128, 139 (1976). "Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Id.* However, the Court has repeatedly emphasized that the implied-reservation-of-water doctrine only reserves "the amount of water necessary to fulfill the purpose of the reservation, no more." *New Mexico*, 438 U.S. at 700 (quoting *Cappaert*, 426 U.S. at 141).

"Each time this Court has applied the 'implied-reservation-of-water doctrine' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and

concluded that without the water the purposes of the reservation would be entirely defeated." *Id.* "This careful examination *is required* both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *Id.* at 701-02 (emphasis added).

The Ninth Circuit failed to apply the above-required examination, instead broadly concluding that the United States held an implied federally-reserved water right in all navigable and non-navigable waters within the Yukon-Charley Rivers National Preserve ("Yukon-Charley") for the purpose of "provid[ing] sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska." *Sturgeon*, 872 F.3d at 934-35. The Ninth Circuit did not analyze whether this purpose would be entirely defeated if the United States did not have a right to use water from all water sources within the Yukon-Charley, including the Nation River. Nor did the court ascertain the minimum amount of water necessary to fulfill that purpose. Rather, the court concluded that it was "bound under its *Katie John* precedent." *Id.* at 934.

In *Katie John*, the Ninth Circuit addressed whether some navigable waters were subject to subsistence fishing and hunting management under ANILCA. *Katie John I*, 72 F.3d at 700, 703. As in this case, the United States argued that the subsistence priority requirement applied to navigable waters in

which the United States owned an implied federally-reserved water right because such waters were "public lands," as defined in ANILCA. *Id.* at 701. The Ninth Circuit agreed with the United States, concluding that when land was reserved under ANILCA, the United States "implicitly reserved appurtenant water, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations." *Id.* at 703. However, the court did not quantify the United States' water rights. Instead the Ninth Circuit concluded that the United States has interests in "some navigable waters," and that "the federal agencies that administer the subsistence priority are responsible for identifying those waters."[3] *Id.* at 703-04.

Thereafter, the Secretaries of the Departments of Agriculture and the Interior initiated an administrative rulemaking proceeding "amend[ing] the scope and applicability of the Federal Subsistence Management Program in Alaska to include subsistence activities occurring on inland navigable waters in which the United States has a reserved water right and to identify specific Federal land units where reserved water rights exist." *Katie John III*, 720 F.3d at 1222. The rules did not identify specific waterbodies or set forth the elements of the water rights the United States claimed to hold. Instead the rules stated generally that the subsistence priority in ANILCA extended to all non-navigable waters within certain land units, all

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[3] In *John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001) (en banc) (per curiam), a much divided court reaffirmed its holding in *Katie John I*.

navigable and non-navigable waters within other land units, and inland waters adjacent to certain land units. *Id.* The Ninth Circuit concluded that the rulemaking at issue was lawful, although the court recognized that an implied federally-reserved water right would normally be decreed by a court. *Id.* at 1227. The court reasoned that because the Secretaries were only "identifying the geographic scope of those rights for the purposes of administering ANILCA's rural substance priority" and not "actually allocat[ing] or reserv[ing] any water in these bodies . . . [t]he agencies are not . . . 'determining their own water rights.'" *Id.* at 1226-27.

Then, focusing on the specific language in Title VIII of ANILCA and the unique circumstances surrounding the subsistence-priority regulations, the Ninth Circuit went on to uphold the agencies' inclusion of all sources listed in the rules as having implied federally-reserved water rights for the purpose of protecting the subsistence way of life for rural residents. *Id.* at 1235-39, 1241. The court did so in spite of the recognition that the United States had never even claimed that "the water itself must be reserved to fulfill the purpose of the ANILCA reservation." *Id.* at 1238. Rather than requiring the United States to prove in fact ownership of an implied federally-reserved water right, the Ninth Circuit concluded that it "must include within its potential scope all the bodies of water on which the United States' reserved rights could at some point be enforced—i.e., those waters that are or may become necessary to fulfill the primary purposes of the federal reservation at issue." *Id.* at 1231.

In the present case, the Ninth Circuit expanded its holding in *Katie John III*, concluding that the same geographic locations designated in *Katie John III* as public lands should apply because "[i]t would be anomalous if we treated the regulation at issue in *Katie John III* . . . as employing a different construction of 'public lands' than applicable elsewhere in ANILCA."[4] *Sturgeon*, 872 F.3d at 934. The court's decision was not based on a finding that an amount of water from any of the designated sources was necessary to fulfill the primary purposes of the federal reservation. Rather, the court simply reiterated its conclusion from *Katie John III* that it should include "all the bodies of water on which the United States' reserved rights *could at some point* be enforced—i.e., those waters that are or *may become necessary* to fulfill the primary purposes of the federal reservation at issue."[5] *Id.*

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[4] The *amici* States take no position on the subsistence regulations that effectuate Title VIII's subsistence priority, an issue unique to the State of Alaska. Rather, the *amici* States' concerns in this case are focused on the misapplication and expansion of the implied-reservation-of-water doctrine and the impact this may have on the States going forward.

[5] Although the Ninth's Circuit's decision was specifically focused on the "geographic scope" of the United States' implied federally-reserved water right, the Ninth Circuit stated that because "one of the reservation's primary purposes is to protect fish[,] [t]he diminution of water in any of the navigable waters within Yukon-Charley's boundaries would necessarily impact this purpose, giving rise to a reserved water right." *Sturgeon*, 872 F.3d at 936. The *amici* States find this statement to be particularly alarming as it appears to imply that the United States' reserved water right extends to *all water on all navigable waters within the reservation*. This is inapposite to this Court's analysis in *Cappaert*, where it was held that a reservation to protect a particular race of desert

at 936 (quoting *Katie John III*, 720 F.3d at 1231) (emphasis in original).

The Ninth Circuit failed to apply the well-established standard set forth by this Court in *Cappaert* and *New Mexico*, instead concluding that it should consider the "geographic scope" of the United States water rights to be any water on which the United States may hypothetically claim a right at some point in the future. Although in *Katie John III* the Ninth Circuit adamantly stated that it was not allowing the federal agencies to determine their own water rights, in practical effect that is what occurred. The Ninth Circuit has treated that administrative designation as conclusive as to whether the United States in fact owns an implied federally-reserved water right in the navigable waters at issue. This is in spite of the Ninth Circuit's own recognition that the United States has never even claimed—let alone proved—that it needed any water from any of the sources designated to meet the primary purposes of the federal reservation. *See Sturgeon*, 872 F.3d at 934-36; *Katie John III*, 720 F.3d at 1238.

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fish did not reserve all of the water in the source at issue. 426 U.S. at 141. Rather, this Court held that "the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved." *Id.* There has been no evidence presented in this proceeding as to the minimum stream flow needed to protect different fish species on the waterways at issue. Nor has there been any suggestion that it is necessary for the United States to maintain the current flow of all waterways to fulfill the primary purposes of the federal reservation.

The United States does not hold a decreed implied federally-reserved water right in the Nation River. Nor has the Ninth Circuit—or any other court—conducted the careful examination required under this Court's decisions in *Cappaert* and *New Mexico* to determine whether it is necessary for the United States to use water from the Nation River to meet the primary purposes of ANILCA. Under the Ninth Circuit's decision, the United States' claim of ownership of a reserved water right divests a state of its sovereign authority over navigable waters within the its borders. *Sturgeon*, 872 F.3d at 936. The *amici* States ask that before such an extraordinary result can be reached, the Park Service should be required to prove that the United States in fact owns a reserved water right.

C. An Implied Federally-Reserved Water Right Does Not Give Any Right to a Particular Waterway Beyond a Priority to Use a Designated Quantity of Water.

The Ninth Circuit's misapplication of the implied-reservation-of-water doctrine appears to stem from the assumption that the benefits conferred by a reserved water right extend beyond a priority to use a designated amount of water from a specified source. *See Katie John III*, 720 F.3d at 1226. This, however, is

inapposite to this Court's analysis of the implied-reservation-of-water doctrine and the nature of water rights generally.[6]

The United States' entitlement to an implied federally-reserved water right is intrinsically tied to the amount of water necessary to fulfill the purposes of the federal reservation. The idea that the "geographic scope" of an implied federally-reserved water right can be separated and adjudicated separately from the quantity of water needed is in direct contradiction to this Court's ruling that a reserved water right only extends to "the amount of water necessary to fulfill the purpose of the reservation, *no more*." *New Mexico*, 438 U.S. at 700 (quoting *Cappaert*, 426 U.S. at 141) (emphasis added). If the United States does not need any water from a particular waterway to fulfill the purposes of the reservation, then it does not hold a reserved water right in that waterway.

The Ninth Circuit's analysis also misconceives the scope of a vested water right. A water right is a special type of property right. *See Navajo Dev. Co., Inc. v. Sanderson*, 655 P.2d 1374, 1377 (Colo. 1982). "The

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[6] The *amici* States' brief focuses on the nature of water rights under the prior appropriation doctrine, as that doctrine is applied in some form in Alaska and the majority of western states with large areas of federally-reserved land. *See* Alaska Const. art. VIII, § 13; Ariz. Rev. Stat. § 45-151(A); Cal. Civ. Code § 1414; Colo. Const. art. XVI, § 6; Idaho Code § 42-106; Mont. Code § 85-2-401; N.D. Cent. Code § 61-04-06.3; Nev. Rev. Stat. § 533.030; N.M. Stat. § 72-1-2; Or. Rev. Stat. § 537.120; S.D. Codified Laws § 46-5-5; Utah Code § 73-3-1; Wash. Rev. Code § 90.03.010; Wyo. Const. art. XIII, § 3.

value of the property right is that it allows a priority to the use of a certain amount of water at a place somewhere in the hierarchy of users who also have rights to water from a common source." *Id.* A water right's primary value "is in its relative priority and the right to use the resource and not in the continuous tangible possession of the resource." *Id.*

By holding a water right, the owner obtains a legally vested priority date that can be asserted against junior water users on the same source. A water right, however, does not entitle an owner to any possessory interest in the source itself or even to actual possession of water from that source. That is because a water right has "always been subject to the rights of senior water rights holders and the amount of water available in the tributary system." *Kobobel v. State, Dep't of Natural Res.*, 249 P.3d 1127, 1130 (Colo. 2011). "[T]he right of property in water is usufructuary and consists not so much of fluid itself as the advantage of its use." *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1353 (Fed. Cir. 2013) (quoting *Eddy v. Simpson*, 3 Cal. 249, 252 (Cal. 1853)); *see also Niagara Mohawk Power Corp.*, 347 U.S. at 246.

The Ninth Circuit's approach of determining the "geographic scope" of a water right without determining the quantity and priority of that right ignores the very nature of a water right. The sole benefit conferred by a water right is the right to assert a priority to use a designated quantity of water as against junior water users on that source. If the United States is not asserting a priority right to use a specified quantity of water

from a waterway, it is simply not asserting ownership of a water right, under the implied-reservation-of-water doctrine or otherwise.

As stated by this Court, the implied-reservation-of-water doctrine is the exception to Congress' almost invariable deference to state water law. *New Mexico*, 438 U.S. at 701-02; *see also California*, 438 U.S. at 653. It is for that reason that implied federally-reserved water rights are to be construed narrowly. *New Mexico*, 438 U.S. at 700-02; *Cappaert*, 426 U.S. at 139-41. The Ninth Circuit's interpretation, however, is anything but narrow. Under the Ninth Circuit's decision, the United States may use a reserved water right solely as a means of expanding an administrative agency's regulatory authority, whether or not water is needed to meet the purposes of a federal reservation. This expands the implied-reservation-of-water doctrine beyond recognition. Allowing such an expansion undermines decades of precedent from this Court and has the potential to significantly increase the impact of reserved water rights to the detriment of the States and private citizens.

D. Even if the United States Holds an Implied Federally-Reserved Water Right, Such a Right Does Not Give the United States "Title" in the Nation River.

Under ANILCA, "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall

be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). "No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." *Id.*

Public lands are defined as "land situated in Alaska which, after December 2, 1980, are Federal lands," excepting:

> (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;
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> (B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and
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> (C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

Id. § 3102(3). Federal lands are "lands the title to which is in the United States after December 2, 1980." *Id.* § 3102(2). Lands include "lands, waters, and interests therein." *Id.* § 3102(1). As found by this Court, the foregoing provides that "only 'lands, waters, and interests therein' to which the United States has 'title' are considered 'public' land 'included as a portion' of the

conservation system units in Alaska." *Sturgeon*, 136 S. Ct. at 1067.

The Ninth Circuit determined that the United States had a "title" interest in the Nation River by virtue of holding an implied federally-reserved water right. *Sturgeon*, 872 F.3d at 935-36. Specifically, the Ninth Circuit reasoned that "[t]he word 'title' has many meanings," including equitable title, "[t]hus 'title' to an 'interest' in water almost certainly means a vested interest in the water, such as a reserved water right." *Id.* at 936. The court went on to state that "even if we were uncertain, *Katie John I* already decided the matter." *Id.* However, the Ninth Circuit in *Katie John I* never analyzed or defined "title" or expressly ruled on whether ownership of an implied federally-reserved water right granted the United States a "title" interest. *See generally Katie John I*, 72 F.3d 698.

The *amici* States disagree with the overly-broad interpretation of "title" employed by the Ninth Circuit. As it is commonly understood, "title" is "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property." *Black's Law Dictionary* 1522 (8th ed. 2004).[7] Additionally, while courts that have addressed the definition of "title" have reached varying results, even the most liberal interpretations have required a *possessory*

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[7] This definition is mirrored in Webster's II New College Dictionary 1185 (3d ed. 2005), defining title as "[t]he coincidence of all the elements that constitute the fullest legal right to control and dispose of property or a claim" or "[t]he aggregate evidence that gives rise to a legal right of possession or control."

interest in the property at issue. *Compare Kohl Indus. Park Co. v. Rockland Cty.*, 710 F.2d 895, 903 (2d Cir. 1983) ("in the absence of limiting language, 'title' is commonly understood to mean a fee interest"), *United States v. City of New Brunswick*, 11 F.2d 476, 477 (3d Cir. 1926), *rev'd on other grounds sub nom. City of New Brunswick v. United States*, 276 U.S. 547 (1928) ("the ownership of title means ownership of property"), *and United States v. Hunter*, 21 F. 615, 617 (C.C.E.D. Mo. 1884) ("when we speak of a man as having title to certain lands, the ordinary understanding is that he is the owner of the fee and not that he is a mere lessee"), *with Totemoff v. State*, 905 P.2d 954, 965 (Alaska 1995) (" 'title' signifies at least some sort of possessory interest in property"), *Roberts v. Wentworth*, 59 Mass. 192, 193 (Mass. 1849) ("If he has the actual or constructive possession of property or the right of possession, he has title thereto."), *Shingleton v. State*, 133 S.E.2d 183, 189 (N. C. 1963) ("If a person has the actual or constructive possession of property, or the right of possession, he has a title thereto, though another person may be the owner."), *and Brady v. Carteret Realty Co.*, 90 A. 257, 258 (N.J. 1914) (" 'Title' is generally applied to signify the right to land and real effects. It is the right of possession or of property in lands as distinguished from the actual possession.").

The Ninth Circuit appears to believe that the common definition of "title" is very broad because it includes equitable title. *Sturgeon*, 872 F.3d at 936. According to the Ninth Circuit, because courts have used the terms "equitable title" and "vested interest"

interchangeably, "title" must also include a vested interest in a water right. *Id.* (citing *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1067 n.6 (9th Cir. 1997)). The *amici* States disagree: equitable title is held when all the benefits of property ownership are vested in one person, except for "the naked legal title." *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428, 432 (1892). Equitable title is not just any beneficial interest in property, but is "[a] title that indicates a beneficial interest in property *and that gives the holder the right to acquire formal legal title.*" *Black's Law Dictionary* at 1523 (emphasis added). A person holding equitable title is vested with "the real and substantial ownership of the property." *Hanson v. Eustace's Lessee*, 43 U.S. 653, 672 (1844). Therefore, a holder of equitable title holds the same rights as one holding legal title, including the right to ownership and possession of the property.

In contrast, a water right is a usufructurary interest, not a possessory or ownership interest. *Niagara Mohawk Power Corp.*, 347 U.S. at 246. A "usufruct" has been defined as "a right to use and enjoy the fruits of another's property for a period without damaging or diminishing it."[8] *Black's Law Dictionary* at 1580. This definition is in line with how both federal and state courts have defined water rights. *Niagara Mohawk Power Corp.*, 347 U.S. at 246 (water rights are

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[8] Usufruct has also similarly been defined as "[t]he right to utilize and enjoy the profits and advantages of something belonging to another so long as the property is not damaged or altered." Webster's II New College Dictionary at 1244.

"usufructuary rights to use the water . . . as distinguished from claims to the legal ownership of the running water itself"); *United States v. Estate of Hage*, 810 F.3d 712, 719 (9th Cir. 2016) ("the owner of water rights owns neither the land nor the water; the right is usufructuary only"); *Casitas Mun. Water Dist.*, 708 F.3d at 1354 ("a party having a right to use a given amount of California surface water does not have a possessory property interest in the corpus or molecules of the water itself"); *Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 605 (10th Cir. 1940) (quoting *Murphy v. Kerr*, 296 F. 536, 541 (D.N.M. 1923)) ("While the corpus of naturally running water belongs to the state in trust for the public, the law recognizes a property right in its flow and use, known as the usufructuary right or the water right."); *Navajo Dev. Co., Inc.*, 655 P.2d at 1377 ("The uncertain nature of the property right in water is evidence that its primary value is in its relative priority and the right to use the resource and not in the continuous tangible possession of the resource."); *Mont. Trout Unlimited v. Beaverhead Water Co.*, 255 P.3d 179, 185 (Mont. 2011) ("a water right is usufructuary, i.e., it is a right to make use of waters owned by the state—a water right confers no ownership in those waters") (quotation marks omitted).

The Park Service's argument in this proceeding draws from the classification of water rights as "rights in real property." *See* Br. for the Resp'ts in Opp'n at 15. *Amici* States agree that in many jurisdictions water rights are considered "property rights." *See, e.g.*, *Olson v. Idaho Dep't of Water Res.*, 666 P.2d 188, 191 (Idaho

1983); *Mont. Trout Unlimited*, 255 P.3d at 185. However, that does mean that the law extends the same benefits to the owner of a water right as is conferred to the owner of land. As stated by the Montana Supreme Court, use of the phrase "property right" in that sense may be misleading:

> Terminology can affect how people think about the subject. The words "property right" draw to themselves and connote a bundle of old, sacred, absolute, and inviolate ideas of exclusivity, possession and permanence. Although these concepts are not alien to water law, they are not the language of water law . . . because water law does not deal with these things, but with uses, re-uses, sharing, and priorities rather than exclusivity, possession or even permanence.

Mont. Trout Unlimited, 255 P.3d at 185 (citation omitted).

Although a water right grants a priority use in a specified quantity of water, it does not grant an unequivocal interest in the water source or in the water itself. A water right has "always been subject to the rights of senior water rights holders and the amount of water available in the tributary system." *Kobobel*, 249 P.3d at 1130. This is because there is always uncertainty as to the quantity of water that will be available for use due to "drought, precipitation, and variable human uses [that] create ever-changing circumstances." Sandra B. Zellmer & Jessica Harder, *Unbundling Property in Water*, 59 Ala. L. Rev. 679, 691-92 (2008).

For this reason, the primary benefit conferred by a water right is "its relative priority and the right to use the resource." *Navajo Dev. Co., Inc.*, 655 P.2d at 1377. A water right does not grant "title" in a water source or even an unequivocal right to actually possess an amount of water. The benefit conferred is the right to assert the relative priority of the right in order to exclude junior water users until the senior right is satisfied. This type of right simply is not a "title" interest as it is commonly understood.

Amici States are concerned that the Ninth Circuit's holding may have broad implications. First, the Ninth Circuit's decision regarding title indicates that it is applicable to any vested water right, not just one acquired pursuant to federal law. *See Sturgeon*, 872 F.3d at 936 (" 'title' to and 'interest' in water almost certainly means a vested interest in the water"). On its face, the Ninth Circuit's decision appears to indicate that the United States' ownership of a water right, whether obtained under state or federal law, would grant the United States title and divest the State of its traditional authority over navigable waters. If this decision is upheld, a State could potentially be considered to have divested itself of authority over a particular waterway by granting the United States a water right license. This could have major impacts for States in the arid West, where the United States has acquired

thousands of water rights under state law for various purposes.[9]

Second, as discussed above, the Ninth Circuit's decision fails to address the quantity of the claimed implied federally-reserved water rights at issue. The court, therefore, appears to conclude that the United States has "title" in a waterway by virtue of holding a water right, no matter how small that right may be. Under this reading, the United States could divest a State of its authority over navigable waters by holding a water right to use as little as a miner's inch of water.[10] To put this in context, in June 2018, the discharge of the Yukon River near Eagle, Alaska, varied between

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[9] The United States Department of Justice states:

> The federal government has also had many notable successes in acquiring water rights under state law. For instance, in the Snake River Adjudication, the United States has been partially decreed approximately 10,000 stockwater rights under state law on BLM lands and approximately 9,000 on national forest lands. The United States has also received 900 partial decrees for state water rights for domestic, irrigation and other uses, such as wildlife, commercial, power, and recreation for Forest Service lands and 50 partial decrees for water uses associated with irrigation on BLM lands.

U.S. Dep't of Justice, *Federal Reserved Water Rights and State Law Claims*, www.justice.gov, https://www.justice.gov/enrd/federal-reserved-water-rights-and-state-law-claims (last visited July 5, 2018).

[10] A miner's inch converts to roughly .02 cubic feet per second (cfs). *See* Idaho Dep't of Water Res., *Water Conversion Factors*, www.idwr.idaho.gov, https://www.idwr.idaho.gov/files/water-measurement/Water-Conversion-Factors.pdf (last visited July 5, 2018).

134,000 and 177,000 cubic feet per second (cfs).[11] Under the Ninth Circuit's decision, the United States could hold title and divest Alaska of its sovereign authority over the Yukon River by holding a priority right to use less than .000015% of the water that flows through the river. Such a conclusion expands the definition of "title" well beyond its common meaning, and completely jettisons the careful balance between federal and state regulatory authority over navigable waters.

CONCLUSION

In enacting ANILCA, Congress did not clearly manifest an intent to preempt Alaska's traditional regulatory authority over state-owned navigable waters in which the United States holds a reserved water right. Owning a water right does not grant a "title" interest in the source of the water. Such an interest is necessary under the plain terms of ANILCA for those waters to be considered "public lands." Moreover, even if owning a water right did provide a title interest, the Park Service has never proved that the United States

[11] This information was obtained from stream flow measurement data collected by the United States Geological Survey (USGS). USGS, *National Water System: Web Interface*, https://waterdata.usgs.gov, https://waterdata.usgs.gov/ak/nwis/uv?cb_00060=on&format=gif_stats&site_no=15356000&period=&begin_date=2018-06-01&end_date=2018-06-30 (last visited July 5, 2018). USGS does not appear to collect stream flow data for the Nation River, so the *amici* States focused on data from the Yukon River at the measurement point closest to the Yukon-Charley.

in fact owns an implied federally-reserved water right on the Nation River. At most, an agency's administrative determination that Congress intended to reserve water for its use is a claim, not a right, to water. For these reasons, the *amici* States respectfully request this Court reverse the Ninth Circuit's decision.

Respectfully submitted,

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No. 17-949

In The Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether the National Park Service has authority to regulate navigable waters that run through federal public lands within National Park System Units in Alaska, and to protect those lands from the potential impacts of water-based activities.

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INTERESTS OF *AMICI CURIAE*

Amici law professors teach and write in the areas of administrative, natural resource, and environmental law and take a professional interest in the development of this Court's jurisprudence in those areas. *Amici* file this brief as individuals and not on behalf of the institutions with which they are affiliated.[1]

SUMMARY OF ARGUMENT

This case is simpler than Petitioner and *Amicus Curiae* State of Alaska suggest. This Court has long recognized the federal government's role in managing public lands for the benefit of all Americans. To play that role, Congress must have authority not only to regulate activities on the public lands, but also to regulate *external* activities that have the potential to impact those lands. Furthermore, Congress may delegate such authority to federal land management agencies like the National Park Service (Park Service). Likewise, Congress exercises broad authority over navigable waters throughout the nation and may similarly delegate that authority to the executive branch.

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[1] The Petitioner provided consent to participation by all *amicus curiae* in a letter on file with the Clerk's office. The Respondent consented to the filing of this brief. *Amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *Amici* made a monetary contribution to the preparation or submission of the brief.

Regardless of any regulatory or proprietary interests that Alaska may possess in the waterways that flow through the Alaska conservation lands, Congress and its delegate the Secretary of the Interior (Secretary), acting through the Park Service, must have authority to regulate water-based activities on the "tens of thousands of miles" of navigable waters that run through Alaska conservation lands, Alaska Amicus Br. at 1, because such activities may severely compromise the values and resources for which Congress designated those lands. To hold otherwise "would place the public domain of the United States completely at the mercy of state legislation." *Camfield v. United States*, 167 U.S. 518, 525–26 (1897).

The implications of such a holding would be sweeping and absurd. Alaska, and Alaska alone, would have the authority to control boat access to federal conservation lands held in trust for the entire American public; to protect those lands from harms stemming from activities on nearby waterways; and to set quotas for fish catch in those waters. Under such an approach, the State could prohibit all boat traffic on waterways within conservation areas, or bar the Park Service from building docks and piers to facilitate federal employees' or the public's access to conservation lands. On the flip side, the Park Service would have no authority to limit hovercraft, oil tanker, or party boat travel through sensitive ecosystems, or to prevent depletion of the stocks of salmon and other fish on which land-based predators within conservation lands depend.

Petitioner and Alaska's approach would also deprive the Alaska conservation lands of federal protection afforded to all other public lands elsewhere in the country. *Outside* the boundaries of the Alaska conservation lands, including *inside* the boundaries of conservation areas in other states, the federal government enjoys broad authority to regulate activities on private property, and on waterways, to protect public lands. Yet Petitioner and Alaska suggest that somehow, by establishing the Alaska conservation areas, Congress stripped the federal government of its otherwise well-understood power to protect those lands from external threats. Under this approach, Alaska conservation lands would be entitled to less federal protection than all other public lands, including lands managed for non-conservation uses within Alaska.

These absurd results flow, Petitioner and Alaska assert, either from basic principles of federalism or from a single sentence in section 103 of the Alaska National Interest Lands Conservation Act (ANILCA). 16 U.S.C. § 3103(c). That sentence addresses "MAPS" and provides, "No lands which, before, on, or after the date of enactment of this Act, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." *Id.*

Fortunately, this Court need not endorse Petitioner and Alaska's approach, for three independent reasons. First, the water flowing within Alaska's navigable waters is not a "land[] . . . conveyed to the State," and no recognized principle of federalism grants

Alaska the power to negate federal regulation of navigable waters. Indeed, the converse is true. Federal law is the supreme law of the land.[2]

Second, regardless of the nature or extent of Alaska's proprietary interests in the relevant waters, the Park Service enjoys the authority to regulate commerce on navigable waters in National Park System Units, and to regulate water-based activities that could impact the surrounding public lands. Those regulatory authorities rest not on federal ownership of the waters but on the long-accepted roles of the federal government as regulator of interstate commerce and manager of public property—roles that Congress expressly delegated to the Secretary in the context of navigable waters within National Park System Units. Moreover, section 103(c) does not affect the Park Service's exercise of those authorities: By its own terms, section 103(c) does not affect Park Service regulations that apply to all lands (and waters) within the boundaries of Park System Units, irrespective of ownership, because such regulations are not "applicable solely to public lands within such unit."

Third, even if section 103(c) is ambiguous, it should not be interpreted to divest the Park Service of authority to regulate the navigable waters within Park

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[2] We also agree with the United States and *amicus curiae* Alaska Native Subsistence Users Who Rely on Fisheries Resources that federal reserved water rights constitute federal interests that fall within ANILCA's definition of "public lands." *See* Resp't Br. at 32-40; Alaska Native Subsistence Users Who Rely on Fisheries Resources Amicus Br. at section II.A

System Units. Such an interpretation is inconsistent with the purposes for which Congress designated Alaska conservation lands and other allowances Congress made for the special circumstances of Alaska. The solitary sentence on which Petitioner and Alaska seized cannot reasonably be read to create such a significant and far-reaching exemption from ANILCA's conservation purposes.

In sum, Petitioner and Alaska contend that activities on navigable waters within Alaska conservation lands, as well as access to and protection of the surrounding congressionally-designated conservation lands and ecosystems, are subject to the whims of the State, which can prevent the Park Service from fulfilling its congressional mandate to manage those areas for the benefit of *all* Americans. That outcome is untenable.

ARGUMENT

I. PETITIONER AND ALASKA FUNDAMENTALLY MISUNDERSTAND THE RELATIONSHIP BETWEEN STATE AND FEDERAL INTERESTS IN NAVIGABLE WATERS.

Petitioner and Alaska make two independent arguments that the state exercises jurisdiction over the water flowing through Alaska's navigable waterways to the exclusion of the Park Service. First, they argue that under the equal footing doctrine, the water was conveyed to the state at the time of statehood and is

therefore insulated from regulation under section 103(c) of ANILCA. Second, they argue in the alternative that principles of federalism bar the Park Service from regulating navigable waterways within conservation lands.

These contentions misrepresent the nature of federal and state interests in navigable waters in three critical ways. First, no principle of United States water law supports the proposition that a state's ownership of submerged lands beneath navigable waters implies exclusive ownership of the associated water. Second, Petitioner and Alaska's contentions conflict with the well-understood structure of our federal system and rest on a "legal fiction," repeatedly rejected by this Court, of state exclusive ownership of natural resources. Third, state exclusive ownership of the waters flowing through navigable rivers, as distinct from the submerged lands under those rivers, is impracticable and inconsistent with both interstate apportionment of water resources and the segment-by-segment analysis of navigability required to determine title. In short, Petitioner and Alaska's approach threatens to upset governance of navigable waters nationwide.

A. The State did not acquire title to water flowing through navigable waterways under the Equal Footing Doctrine.

Water within a waterway is not owned in the same manner as land. While both federal and state entities may possess overlapping proprietary and regulatory

interests in the water, such as federal reserved water rights and state water allocations, respectively, these interests fall short of exclusive ownership of water while it remains within navigable waterways. *See Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 (1954).

No American or English legal tradition supports Alaska's claim of exclusive ownership. In particular, the two systems of water law in the United States, prior appropriation rights and riparian rights, provide no support for such a theory. *See Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982). The prior appropriation doctrine completely separates water rights from land ownership. *See id.* While the riparian doctrine recognizes that riparian land ownership gives rise to a shared, correlative, usufructuary water right, *see id.*; *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 745 (1950) (discussing the history and nature of riparian rights), such a right is a far cry from a traditional property interest in water within a waterway.

Nonetheless, Petitioner and Alaska argue that Alaska owns the water under the Equal Footing Doctrine, *see* Pet.'s Br. at 27–28, Alaska Amicus Br. at 7–8, which recognizes that at statehood, a state acquires "title within its borders to the beds of waters then navigable." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012). But this Court has never stretched the Equal Footing Doctrine to grant states title to the *water* within navigable waterways. This theory of conveyance amounts to a contention that the conveyance of submerged lands implicitly includes an exclusive

proprietary interest in an entirely separate resource, water, simply because the two resources are adjacent. That is akin to an assertion that conveyance of a residential house and lot implicitly conveys an exclusive proprietary interest in the bounding street.

Contrary to Petitioner's suggestion, Pet.'s Br. at 33, the Submerged Lands Act (SLA) does not provide support for Alaska's exclusive ownership of the molecules of water flowing through navigable waterways. As applied to inland navigable waters, the SLA merely codifies state title to submerged lands and recognizes state interests in related "natural resources," such as minerals and fisheries. *See* 43 U.S.C. §§ 1301-15. Notably, the SLA refers to lands and waters separately, granting to the states rights to certain specifically defined "submerged lands," and to "natural resources" within the lands and waters. No provision purports to convey rights in the waters themselves. Furthermore, the definition of "natural resources" does not include "water" and specifically excludes "water power, or the use of water for the production of power." *Id.* § 1301.

Indeed, the SLA also reserves to the United States certain rights, including the right to regulate navigation and commerce. *Id.* § 1311(d) ("Nothing in this subchapter . . . shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation . . . or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation. . . ."); *id.* § 1314(a)

("The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title."). Thus, the SLA reinforces the United States' ongoing authority to regulate navigation and commerce on all navigable waters within Alaska.

The Alaska Supreme Court itself has endorsed this reading of the SLA. Decades after passage of the Act, that court reaffirmed the federal government's "paramount authority" over the navigable waters overlying the submerged lands conveyed by the SLA. *See State v. Bundrant*, 546 P.2d 530, 543 (Alaska 1976).

B. Recognizing exclusive state ownership of instream water would upset the balance of authority in our federal system.

Exclusive state ownership of the water flowing through navigable waterways would interfere with the balance of regulatory authority exercised by the federal and state governments. Both sovereigns exercise authority over distinct aspects of water within

navigable waterways. The federal government's regulatory role includes advancing interests in navigability essential to national and international travel, commerce, and security. *See PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012). Accordingly, this Court has long recognized that navigable waters are subject to the federal navigational servitude as well as to federal commerce clause authority. *See Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979); *United States v. Rands*, 389 U.S. 121, 122–23 (1967). The federal role also includes coordinating water allocation among the several states, tribes, and federal public lands. *See generally Arizona v. California*, 460 U.S. 605, 608 (1983) (describing the apportionment of Colorado River water among states and tribes). States, for their part, may regulate uses of navigable waters so long as they do so in a manner consistent with federal law, and they may control intrastate water apportionment. *See Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013).

The concurrent federal and state regulatory authorities over navigable waters reflect the balance of federal and state power inherent in the federal structure of the United States. To the extent that conflicts arise out of these overlapping regulatory interests in navigable water, our constitutional structure provides a resolution under the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the paramountcy doctrine, which dictate that state interests cannot supersede federal ones. *See PPL Montana*, 565 U.S. at 591 (noting "the paramount power of the United States to control such

waters for purposes of navigation in interstate and foreign commerce").

This Court has repeatedly held that states may not defeat federal authority by declaring exclusive state ownership of water or other natural resources. For example, in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), this Court rejected a state's assertion that it owned groundwater and thus could exclude such water from federal regulation of interstate commerce. The state's "public ownership theory" was, however, nothing "but a fiction" and did not displace federal authority under the Commerce Clause. *Id.* at 951. In *Hughes v. Oklahoma*, 441 U.S. 322, 338 (1979), this Court similarly held that states may not restrict interstate commerce in wild animals by declaring them state property, because state ownership of animals in the wild is also a "fiction." *See id.* (discussing additional cases dispelling the fiction of state ownership). These cases stand for the proposition that while states have important interests in natural resources within their borders, they do not "own" these resources as traditional property, and they cannot usurp federal regulatory authority simply by declaring such ownership.[3]

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[3] While state law may define the relative property rights of the state government and its citizens in water or other natural resources, federal law defines the relative rights among the several states and as between the states and the federal government. *Cf. Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 369 (1977) (explaining that federal common law governs application of the Equal Footing Doctrine).

Petitioner and Alaska invoke this same "fiction of state ownership" in their effort to bar application of Park Service regulations to activities on the waterways that run through Alaska conservation lands. Recognizing exclusive state ownership of the water flowing through navigable waterways, however, risks the type of state-by-state exclusion and protectionism that our federal system was structured to avoid. *See, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) ("Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress."). As in *Sporhase* and *Hughes*, Alaska should not be permitted to divest the federal government of authority over navigable waterways simply by claiming that the state owns the water flowing through them.

C. State ownership of navigable waters is inconsistent with interstate water apportionment and segment analysis of navigability for title.

If a state "owned" the water molecules flowing through navigable waters, why would that interest extinguish at a state's boundary or along non-navigable stretches of a waterway? The theory advanced by Petitioner and Alaska provides no answer.

A state cannot assert regulatory authority over, let alone a proprietary interest in, water that has flowed beyond state lines or into the territorial seas. Any

assertion to the contrary would throw interstate water apportionment into chaos. *See, e.g.*, *Arizona*, 460 U.S. at 608. Moreover, states do not own the submerged lands beneath non-navigable stretches of otherwise navigable waters. *See PPL Montana*, 565 U.S. at 593. The "[p]hysical conditions that affect navigability often vary significantly over the length of a river," *id.* at 595, meaning that the submerged lands beneath a waterway may shift rapidly among federal, state, and private ownership. The state has no coherent ownership interest in water that may soon course over lands owned by other parties or flow into another state.

Alternatively, if Alaska claims only temporary (that is, partial) "ownership" of navigable waters passing through the state, property law offers no basis for the exclusive authority that Alaska seeks to exercise here. Nothing about temporary or partial ownership negates concurrent federal usufructuary and regulatory interests. On the contrary, the partial nature of such a state interest highlights the need for concurrent federal management of transitory interstate resources.

II. THE PARK SERVICE HAS AUTHORITY TO REGULATE NAVIGABLE WATERS THAT RUN THROUGH ALASKA CONSERVATION LANDS, REGARDLESS OF WHO HOLDS TITLE TO THOSE WATERS.

This case need not, however, turn on this Court's assessment of who owns the water flowing through the Nation River. Regardless of who holds title to that

water, neither federalism principles nor ANILCA section 103(c) authorize Petitioner to operate a hovercraft on that River in contravention of Park Service regulations. Congress has constitutional authority to regulate navigable waters regardless of whether they are federal property, and it has delegated authority over all navigable waters within the boundaries of National Park System Units to the Secretary and his agent the Park Service. Because the Park Service's regulations apply irrespective of ownership, they are not "solely applicable to public lands," and therefore do not fall within the literal terms or any sensible understanding of ANILCA section 103(c). 16 U.S.C. § 3103(c).

A. The Property and Commerce Clauses vest Congress with broad authority to protect public lands and regulate navigable waters.

As discussed in part I, Alaska holds at most a partial interest in the navigable waters that run through Alaska conservation lands. The Court need not resolve the extent of that interest, however, because longstanding precedent establishes two relevant spheres of federal government authority: authority under the Property Clause, U.S. Const. art. IV, § 3, cl. 2, to regulate activities on state and private property to protect public lands, and authority under the Commerce Clause, *id.* art. I, § 8, cl. 3, to regulate activities on and uses of navigable waters throughout the nation.

With respect to the first sphere of authority, Congress holds public lands in trust for the American people. *See United States v. Trinidad Coal & Coking Co.*, 137 U.S. 170 (1890). To effectuate that trust, the Property Clause vests Congress with power to manage and control public lands and their uses in much the way that any property owner exercises dominion over her property. But Congress also has a broader "police power" to regulate non-federal property provided such regulation is directed to the "protection" of public lands. *Camfield*, 167 U.S. at 525–26; *see also Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) ("Congress exercises the powers both of a proprietor and of a legislature over the public domain.").

Indeed, this Court has never found Congress to exceed its authority to protect public lands from external threats, and has upheld laws that prohibit non-federal property owners from erecting fences that enclose public lands, *Camfield*, 167 U.S. at 528 (construing Unlawful Inclosure Act, codified at 43 U.S.C. § 1061), kindling unattended fires near forests on public lands, *United States v. Alford*, 474 U.S. 264, 267 (1927) (construing criminal statute codified at 18 U.S.C. § 1856), or gathering wild horses that stray from public lands, *Kleppe*, 426 U.S. at 545–47.

Lower courts, too, have consistently sustained limitations on "conduct off federal land that interferes with the designated purposes of" public lands, *Minnesota v. Block*, 660 F.2d 1240, 1249–50 (8th Cir. 1981), including hunting, *United States v. Stephenson*, 29 F.3d 162, 163–64 (4th Cir. 1994); *United States v. Brown*,

552 F.2d 817, 821–22 (8th Cir. 1977); *Bailey v. Holland*, 126 F.2d 317, 324 (4th Cir. 1942), snowmobiling and motor boating, *Block*, 660 F.2d at 1249–50 (8th Cir. 1981), delivery and retrieval of rented watercraft, *Free Enters. Canoe Renters Ass'n of Mo. v. Watt*, 711 F.2d 852, 856 (8th Cir. 1983), construction of docks, *High Point, LLP v. Nat'l Park Serv.*, 850 F.3d 1185, 1189 (11th Cir. 2017), and access to privately owned minerals, *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 630 F.3d 431, 442 (5th Cir. 2011).

Uses of waterways that run through public lands have obvious and direct impacts on the surrounding lands. Driving a hovercraft, speedboat, or oil tanker along a river may disturb wildlife, impair natural vistas, erode banks, or interrupt solitude. Congress's power under the Property Clause, therefore, amply supports regulation of such uses on waterways that cross public lands, regardless of who holds title to those waters.

Congress's second relevant sphere of regulatory authority derives from the Commerce Clause. As this Court has recognized, that clause grants the federal government "pervasive . . . authority" over navigable waters. *Kaiser Aetna*, 444 U.S. at 173. The most familiar facet of this authority is the regulation of navigation itself, but the authority also extends to other national purposes, such as "[f]lood protection [and] watershed development[;] . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government." *United States v. Appalachian Elec.*

Power Co., 311 U.S. 377, 308 (1940). Indeed, "the power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government." *Gibbons v. Ogden*, 22 U.S. (Wheat) 1, 190 (1824).

In sum, although Alaska suggests that allowing the federal government to regulate activities on navigable waters in Alaska conservation lands would "usurp traditional state sovereignty," Alaska Amicus Br. at 19, it is instead the State that seeks to usurp traditional federal authority to protect public lands from external threats and to regulate navigable waters. The Supremacy Clause directs that if a state law related to public lands or navigable waters conflicts with legislation enacted by Congress—or with regulations promulgated by federal agencies acting within the scope of properly delegated authority—then the state law is preempted. *See City of New York v. F.C.C.*, 486 U.S. 57, 63 (1988); *Kleppe*, 426 U.S. at 543.

B. Congress properly delegated Property and Commerce Clause authorities over navigable waters that run through National Park System Units to the Secretary of the Interior and his agent the National Park Service.

Congress properly exercised its authority under the Property Clause and Commerce Clause to charge the Secretary of the Interior (and his agent the Park Service) with regulating navigable waters that run

through National Park System Units. Public Law 94-458, 90 Stat. 1939 (Oct. 7, 1976), which accomplishes the delegation, implicitly recognizes the many interconnections between the lands and waterways within those units. The delegation therefore includes broad language authorizing the Secretary to "prescribe regulations . . . concerning boating *and other activities on or relating to* water located within [National Park] System Units, including"—but notably not limited to—"waters subject to the jurisdiction of the United States." *Id.* § 2, codified at 54 U.S.C. § 100751(b) (emphasis added).[4]

Nothing in the text of that delegation expressly identifies the constitutional source of the authority Congress exercised. Other congressional actions related to National Park System Units, however, strongly suggest that Congress intended the Park Service to wield both Property Clause and Commerce Clause powers.

First, with respect to the Property Clause, the broad delegation in Public Law 94-458 parallels other instances in which Congress has granted the Secretary authority to protect public lands in the National Park System from both internal and external threats to the conservation values for which the lands were designated. For example, Congress has authorized the

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[4] Congress directed that such regulations "shall be complementary to, and not in derogation of, the authority of the Coast Guard to regulate the use of waters subject to the jurisdiction of the United States." Pub. L. 94-458 § 2, codified at 54 U.S.C. § 100751(b).

Secretary to regulate mining and solid waste disposal within the boundaries of National Park System Units, regardless of whether those activities occur on the public lands. *See* 16 U.S.C. § 459d-3(a) (regulation of "mining and removal" of reserved minerals); 54 U.S.C. § 100903(a) (regulation of solid waste disposal "within the boundaries of any System unit"). Similarly, Congress has subjected "any person that destroys, causes the loss of, or injures any System unit resources" to liability, regardless of where her activity occurred. 54 U.S.C. § 100722.[5] These examples suggest that the Park Service's authority to regulate waters that run through National Park System Units rests at least in part on an understanding that the threats to those units could come from *external* water-based sources, and therefore that the Park Service's authority should not be limited to waters to which it holds clear and exclusive title.

Other past congressional and Park Service actions, however, suggest a shared understanding that the Park Service also wields delegated Commerce Clause authority over certain navigable waters. Specifically, Congress charged the Park Service with managing congressionally-designated wild and scenic rivers, 16 U.S.C. § 1271(c) (designating "[a]ny component of the national wild and scenic river system" administered by the Park Service as a component "of the national park system"), even though those rivers often

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[5] These provisions supplement the Secretary's general authority to issue regulations "for the use and management of [National Park] System units." 54 U.S.C. § 100751(a).

run through significant stretches of non-federal lands. *See, e.g.*, 16 U.S.C. § 460m (designating Ozark National Scenic Riverways); S. Rep. No. 575, 88th Cong., 1st Sess. (1963) 9 (letter from Secretary of the Interior) (explaining that the federal government owned only 800 of the 94,000-acres included in the designation). To manage those rivers, the Park Service must regulate the waters themselves, often without relying on any external threat to surrounding public lands.

Indeed, in a letter to Congress in support of Public Law 94-458, the Secretary recognized that managing National Park System resources must rest in part on Commerce Clause authority. The letter explains that there has been "a phenomenal increase in recreational boating and other water-related activities that affect the resources of many areas of the National Park System." S. Rep. No. 94-1190, 94th Cong., 2d Sess. 11 (1976) (letter from Secretary of the Interior); House Rep. No. 94-1589, 94th Cong., 2d Sess. 12-13 (1976) (same). By vesting the Secretary with express authority "to regulate boating and other water-related activities," therefore, "Congress would be clarifying its intent to invoke its powers under the Commerce Clause of the constitution . . . to assist in the administration of the Park System." Sen. Rep. No. 94-1190 at 11; House Rep. No. 94-1589 at 12–13.

The text of Public Law 94-458 also indicates that Congress intended to invoke, at least in part, its Commerce Clause authority. Congress included the phrase "water subject to the jurisdiction of the United States" twice in the relevant statutory section, once to define

the scope of the Secretary's authority, and a second time to describe the concurrent jurisdiction of the Coast Guard. As illustrated by a variety of laws including the Federal Boat Safety Act of 1971, Pub. L. 92-75, 85 Stat. 213 (Aug. 10, 1971), the Federal Boat Act of 1958, Pub. L. 85-911, 72 Stat. 1754 (Sept. 2, 1958), and the Motorboat Act of 1940, Pub. L. 76-484, 54 Stat. 163 (Apr. 25, 1940), Congress has indisputably delegated broad Commerce Clause authority to the Coast Guard to regulate vessels on *all* navigable waters of the United States, regardless of ownership. Yet Public Law 94-458 describes the reach of the Park Service's authority in the same terms as that of the Coast Guard's authority. The same phrase, in the same statutory section, should generally be ascribed the same meaning. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). Absent contrary indications (of which there are none), Public Law 94-458 therefore implies that the Park Service, like the Coast Guard, enjoys Commerce Clause authority over navigable waters within National Park System Units.

C. The Park Service had ample authority under Public Law 94-458 to issue the hovercraft regulation.

The Park Service properly exercised the authority delegated in Public Law 94-458 when it acted to ban "operation or use of hovercraft," 36 C.F.R. § 2.17(e), on "navigable waters and areas within their ordinary

reach . . . and without regard to the ownership of submerged lands, tidelands, or lowlands" within National Park System Units, *id.* § 1.2(a)(3). As noted above, Public Law 94-458 delegates authority to "prescribe regulations . . . concerning boating" within National Park System Units, including on any "waters subject to the jurisdiction of the United States." Pub. L. 94-458 § 2, codified at 54 U.S.C. § 100751(b). The precise definition of the term "waters subject to the jurisdiction of the United States" is subject to some debate, *see Rapanos v. United States*, 547 U.S. 715 (2006), but no definition of that term excludes *actually navigable waters* like the stretch of the Nation River at issue here. There can be no argument, therefore, that the Park Service overreached in banning hovercraft use on that river.

D. Nothing in ANILCA deprives the Park Service of its otherwise applicable authority to regulate boating on navigable waters that run through Alaska conservation lands.

Finally, nothing in section 103(c) of ANILCA deprives the Secretary of his otherwise applicable and properly delegated authority (1) to protect public lands from external threats, including water-based threats, and (2) to regulate the use of navigable waters within Park System Units. In relevant part, section 103(c) provides that "[n]o lands . . . conveyed to the State . . . shall be subject to regulations applicable solely to public lands within [Alaska conservation] units." But the

hovercraft ban applies "without regard to ownership" and is therefore, on its face, not "applicable solely to public lands." 16 U.S.C. § 3103(c). Thus, just as Alaska may not authorize use of a vessel on the Nation River (or on any other navigable waterway within the State) if that vessel does not comply with the Coast Guard's safety standards, the State may not authorize the use of a vessel within the Yukon-Charley Rivers National Preserve if that vessel does not comply with applicable Park Service regulations.

Importantly, this reading of section 103(c) does not deprive the provision of all meaning, because there are numerous Park Service regulations that *do* "appl[y] solely to public lands." Indeed, this is true of *most* Park Service's regulations. *See* 36 C.F.R. § 1.2(b) (subject to certain exceptions, including an express exception for the boating regulations, Park Service regulations "do not apply on non-federally owned land and waters").

For example, visitors to Alaska's conservation lands are generally authorized to camp and picnic, subject to limitations, but they may not "[l]eav[e] personal property longer than 4 months." *Id.* §§ 13.25, 13.26, 13.45. Furthermore, visitors to Yukon-Charley Rivers National Preserve must get a permit for commercial grazing, large political demonstrations, or subsistence tree harvest.[6] These rules and regulations do not authorize picnicking, camping, grazing, demonstrating,

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[6] *See* Yukon-Charley Rivers National Preserve Compendium §§ 2.10(a), 2.13(a)(13), 2.51, 2.60(a)(3), 13.485(a)(1) (Mar. 28, 2018), *available at* https://www.nps.gov/locations/alaska/upload/yuch-compendium-2018.pdf.

or subsistence tree harvesting on non-public lands, and they do not prohibit non-federal land owners within the conservation boundaries from storing possessions on their own property for longer than four months. *These* rules and regulations, in short, "apply solely to public lands," and could not lawfully be applied to property owned by Alaska under section 103(c). But Park Service regulations that apply to all navigable waters within Park System Units, including the hovercraft ban, are expressly among the exceptions to this general limitation. *Id.* § 1.2(a)-(b).[7]

Thus, section 103(c) recognizes two categories of federal regulations: those that apply only to federal property, and those that apply to all property, irrespective of ownership. The first category, which includes the camping regulation described above, is "solely applicable to public lands" and is therefore inapplicable on non-federal lands within a conservation boundary. The second category, which includes the hovercraft ban, is applicable to all property—whether owned by the state, a private individual, or the United States—that lies within a conservation boundary.

Any other reading of section 103(c) would wreak havoc, not only in Alaska but nationwide. Construing the hovercraft regulation as a regulation "solely applicable to public lands" under section 103(c) would

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[7] The Park Service amended § 1.2 in 1996 specifically to eliminate any doubt that its regulations applied to "non-federally owned . . . waters," and to ensure that "an ordinary person" would have a "reasonable opportunity to know when regulations apply." 61 Fed. Reg. 35,133, 35,134 (July 5, 1996).

render the regulation inapplicable not only on state-owned waters within the Alaska conservation lands but also on non-federal waters within other National Park System Units. Such a holding would, in turn, leave conservation lands around the country vulnerable to inappropriate and intensive activities on any waterways of mixed or unclear ownership, thereby significantly impairing the conservation values for which the lands were designated. *See, e.g., Free Enters. Canoe Renters Ass'n of Mo.*, 711 F.2d at 856 (upholding National Park Service authority to prohibit activities associated with the commercial rental of canoes within the boundaries of the Ozark National Scenic Riverways); *Block*, 660 F.2d at 1249–50. Such a ruling could also call into question other regulatory regimes designed to protect public lands from external threats, such as limits on hunting near wildlife refuges or disposing of solid waste within the boundaries of National Park System Units. *See, e.g., High Point*, 850 F.3d at 1189; *Dunn-McCampbell Royalty Interest*, 630 F.3d at 442; *Stephenson*, 29 F.3d at 163–64.

III. WHATEVER SECTION 103(C) MEANS, IT DOES NOT PERMIT ALASKA TO AUTHORIZE USES OF WATERWAYS WITHIN CONSERVATION AREAS IF THOSE USES CONFLICT WITH PARK SERVICE REGULATIONS.

Petitioner and Alaska's reading of section 103(c) is also inconsistent with the broad framework and structure of ANILCA, including the Act's express intent to

protect specific waterways and water resources, and its careful efforts to balance national conservation interests with state, tribal, and local interests particular to Alaska.

Throughout ANILCA, Congress expressed its intention to protect waterways and their resources within the boundaries of the Alaska conservation areas. For example, the purposes of the statute include "to protect and preserve . . . rivers . . . and related recreational opportunities including . . . canoeing [and] fishing . . . on freeflowing rivers." Pub. L. 96-487 § 101, codified at 16 U.S.C. § 3101. Seven of the ten newly designated conservation areas identify waterways and their protection as integral components. Yukon-Charley Rivers National Preserve, for instance, was designated to "maintain the environmental integrity of the entire Charley River basin, including streams, lakes, and other natural features, in its undeveloped natural condition." *Id.* § 201(10), codified at 16 U.S.C. § 431 note. Aniakchak National Monument maintains a "caldera . . . the Aniakchak River and other lakes and streams, in their natural state." *Id.* § 201(1). Gates of the Arctic National Park "maintain[s] the wild and undeveloped character of the area, including opportunities for visitors to experience solitude, and scenic beauty of the . . . rivers [and] lakes." *Id.* § 201(4)(a). Kobuk Valley National Park "maintains the environmental integrity of the natural features of the Kobuk River Valley, including the Kobuk, Salmon, and other rivers . . . in an undeveloped state." *Id.* § 201(6). Lake Clark National Park "maintain[s] unimpaired the

scenic beauty and quality of portions of the Alaska Range and the Aleutian Range, including . . . wild rivers, lakes, [and] waterfalls." *Id.* § 201(7)(a). Noatak National Preserve "maintain[s] the environmental integrity of the Noatak River." *Id.* § 201(8)(a). And Wrangell-Saint Elias National Park "maintain[s] unimpaired the scenic beauty and quality of . . . lakes, and streams." *Id.* § 201(9). Finally, Congress also referenced protection of waterways as a purpose of expanding Glacier Bay National Monument and Katmai National Monument. *Id.* § 201(1)-(2).

These numerous indications that Congress intended ANILCA to protect the rivers and streams within Alaska conservation lands are entirely inconsistent with the contention that a solitary sentence in the more than 175 pages that make up the Act, *see* 94 Stat. 2371-551 (Dec. 2, 1989), hidden in a provision entitled "MAPS," grants the State authority to permit (or to restrict) any use of those waterways, no matter how destructive or intensive the permitted uses (or how integral to the Park Service's conservation or navigation activities).

Alaska's interpretation would also upend the careful balance that ANILCA strikes between conservation and other uses of these unique Alaska lands. ANILCA section 1110, for example, addresses access issues, authorizing the use of various forms of transportation, including motorboats, "for traditional activities . . . and for travel to and from villages and homesites," but only subject to "reasonable regulations." 16 U.S.C § 3170(a)-(b). The section also guarantees non-federal property

owners "adequate and feasible access" across conservation areas. *Id.* In other words, Congress struck a compromise: waterways within conservation areas may be used for certain transportation purposes, but only subject to regulation to protect the purposes for which conservation areas were designated. Alaska's reading of section 103(c) would deprive the federal government of its authority over such transportation uses and thwart Congress's manifest intention to balance federal, state, tribal, and private interests.

Moreover, section 1110 is only one of many statutory compromises that Alaska's reading of ANILCA would distort. As this Court previously recognized, the Act "carves out numerous Alaska-specific exceptions to the Park Service's general authority over federally managed preservation areas," *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016), but every one of those statutory exceptions is specific, tailored, and balanced. Section 304, for example, allows commercial fishing within wildlife refuges, and "the use of Federal lands, for campsites, cabins, motorized vehicles, and aircraft landing directly incident" to commercial fishing, but the section makes clear that such uses are "subject to reasonable regulation." Pub. L. 96-487 § 304, 94 Stat. 2393.[8] Likewise, section 205 prohibits the Secretary from taking "action to restrict *unreasonably* the exercise of valid commercial fishing rights or privileges," including attendant uses of public lands, within specific conservation lands managed by the Park Service.

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[8] This provision of ANILCA does not appear to have been codified into the U.S. Code.

Id. § 205, codified at 16 U.S.C. § 410hh-4 (emphasis added). Section 811 guarantees "*reasonable* access to subsistence resources on the public lands" and authorizes "*appropriate* use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation . . . , *subject to reasonable regulation*." *Id.* § 3121(b), codified at 16 U.S.C. § 3121(b) (emphasis added). Finally, section 1313, which permits sports hunting and fishing in conservation lands designated as Alaskan National Preserves, authorizes the Secretary to "designate zones where and periods when no hunting, fishing, trapping, or entry may be permitted for reasons of public safety, administration, floral and faunal protection, or public use and enjoyment." *Id.* § 1313, codified at 16 U.S.C. § 3201.

None of these exceptions is unlimited, and each recognizes the authority of the relevant federal land manager to regulate the allowed uses to protect the conservation values of the surrounding conservation lands. In short, Congress balanced local conditions and needs with the national interest in protecting Alaska conservation lands. In no case did that balance tilt fully in favor of Alaska, as the State now claims.

Moreover, Petitioner and Alaska's interpretation of section 103(c) would render the Park Service powerless to effectuate ANILCA's fundamental conservation purposes. While the facts before the court involve a solitary hunter using a hovercraft, under Petitioner and Alaska's interpretation the Park Service would lack authority to limit commercial fishing, to restrict the use of party barges, oil tankers, or drilling rigs, or to

regulate any other use of navigable waters within the Alaska conservation lands. Such an outcome would upset ANILCA's careful balance of local, state, tribal, and federal interests in Alaska's unique conservation areas. This Court should not read section 103(c)'s spare and opaque language to so significantly alter ANILCA's broader statutory scheme. *Cf. Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) (noting that Congress does not "hide elephants in mouseholes").

CONCLUSION

This case is straightforward. The protection of public lands and the regulation of navigable waters are traditional domains of federal sovereignty. Congress directed the Park Service to regulate navigable waters within National Park System Units. The Park Service exercised that authority to ban use of hovercrafts, and that ban applied to Petitioner. The Court need look no further to affirm the lower court's judgement in favor of the federal defendants.

Petitioner and Alaska argue that the Park Service lacks jurisdiction over Alaska's rivers for two reasons, each of which is untenable: a novel assertion that the state owns the molecules of water flowing through navigable rivers, and a reading of ANILCA section 103(c) that strains the text, would undermine numerous other provisions of the statute, and would upset Park Service regulation of navigable waters elsewhere in

the country. The Court should reject these arguments and their sweeping and absurd implications, and instead uphold the Park Service's authority to regulate navigable waters that run through federal public lands within National Park System Units in Alaska.

Respectfully submitted,

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No. 17-949

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of National Parks Conservation Association, Defenders of Wildlife, The Wilderness Society, American Rivers, Center for Biological Diversity, Sierra Club, Wilderness Watch, Denali Citizens Council, Copper Country Alliance, Alaska Quiet Rights Coalition, Northern Alaska Environmental Center, Friends of Alaska National Wildlife Refuges, Alaska Wilderness League, in Support of Respondents

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36 C.F.R. § 2.17(e) 19

36 C.F.R. § 3.15(a) 19

Other Authorities

General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30252 (June 30, 1983) 9, 19

H.R. REP. NO. 94-1569, *reprinted in* 1976 U.S.C.C.A.N. 4290 8

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NAT'L PARK SERV., WINTER PATROLS IN YUKON-CHARLEY RIVERS, http://www.nps.gov/yuch/learn/news/upload/YUCH WinterPatrols2-fixed.pdf 21

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Yukon-Charley Rivers: What is Yukon Charley Rivers, NAT'L PARK SERV., http://www.nps.gov/yuch/what-is-yukon-charley-rivers.htm (last visited Dec. 20, 2015) 13

INTRODUCTION[1]

At issue in this case is the authority of the National Park Service (Park Service) to regulate navigation on navigable waters within the Yukon-Charley Rivers National Preserve, a unit of the National Park System in eastern Alaska on the border of Canada. *See* Map at A1. The Yukon River extends nearly 2,400 miles from British Columbia and the Yukon Territory in Canada across the entire State of Alaska, to empty into the Bering Sea. *Ibid.* The Nation River, where petitioner seeks to use his hovercraft, is a tributary of the Yukon River that is navigable all the way to the Canadian border. *Alaska v. United States*, 201 F.3d 1154, 1158, 1164 (9th Cir. 2000). Congress, through the NPS Organic Act and the Alaska National Interest Lands Conservation Act (ANILCA), delegated authority over boating within the National Park system to the National Park Service. Section 103(c) of ANILCA, 16 U.S.C. 3103(c), did not withdraw this authority.

INTERESTS OF AMICI CURIAE

Amici curiae are a diverse group of nonprofit organizations that have a substantial interest in ensuring that Alaska's Conservation System Units (CSUs) established by Congress in the Alaska National Interest Lands Conservation Act (ANILCA) are preserved and managed as mandated by Congress. Amici agree with the government that the 1976

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[1] The parties in this case have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

amendment to the National Park Service Organic Act granted the National Park Service the authority to regulate boating and other activities "on . . . waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." 54 U.S.C. § 100751 (Pub. L. No. 94-458, 90 Stat. 1939 (Oct. 7, 1976), amending the Act of August 25, 1916, Publ. L. No. 64-235, 39 Stat. 535). Congress expressly incorporated this NPS authority over navigable waters in ANILCA. 16 U.S.C. § 410hh-2. The authority was not withdrawn or preempted by Section 103(c) of ANILCA. 16 U.S.C. § 3103(c).

Amici include national, regional, and local nonprofit organizations:

- The National Parks Conservation Association works to protect the National Park System;
- American Rivers seeks to protect wild rivers and restore damaged rivers;
- The Wilderness Society works to protect wilderness and America's public lands;
- Defenders of Wildlife works to protect wildlife and wildlife habitat;
- The Center for Biological Diversity seeks to protect all species from extinction;
- The Sierra Club seeks to encourage Americans to explore, enjoy, and protect the planet;
- Wilderness Watch works to defend and keep wild the nation's National Wilderness Preservation System;
- The Alaska Wilderness League seeks to preserve wild lands and waters in Alaska;

- The Alaska Quiet Rights Coalition seeks to protect and maintain natural quiet within Alaska's public lands;
- The Friends of Alaska National Wildlife Refuges works to promote the conservation of all Alaska National Wildlife Refuges;
- The Denali Citizens Council works to promote the natural integrity of Denali National Park and Preserve;
- The Copper Country Alliance seeks to protect the Copper River Basin, including the Wrangell-St. Elias National Park and Preserve; and
- The Northern Alaska Environmental Center works to protect habitats in Interior and Arctic Alaska.

Amici file this brief in support of the Park Service, to highlight for the Court the importance of the Park Service's jurisdiction over navigable waters to the continued protection of Alaska's National Parks[2] and other Conservation System Units created by ANILCA. *Amici* and their members have a long history of using and enjoying these places for the values Congress sought to protect when establishing these areas, and have a strong interest in their protection.

SUMMARY OF THE ARGUMENT

The issue in this case is whether ANILCA repealed the Park Service's long-standing authority to regulate navigable waters within park boundaries. It did not.

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[2] Throughout the brief, either "national parks" or "parks" is used to refer to National Park System Units, including National Preserves, which are all managed by the Park Service.

The power of the Park Service to regulate navigable waters in parks rests on the Constitution and on statutes that delegate that authority. Congress has long directed the Park Service to regulate "boating and other activities on or relating to water located within System units." 54 U.S.C. § 100751(b).[3] ANILCA itself specifically preserves pre-existing federal authority over rivers and the public lands. 16 U.S.C. §§ 3202(b), 3207. Indeed, ANILCA explicitly requires that the use of motorboats "shall be subject to reasonable regulations by the Secretary [of the Interior] to protect the natural and other values of the conservation system unit . . . ." 16 U.S.C. § 3170(a). In its very first section, ANILCA makes protection of those "natural and other values" its core purpose, *ibid*, and defines those values in great detail to include, among other things, protection of "rivers . . . to preserve wilderness resource values and related recreational opportunities . . . on freeflowing rivers." *Id.* § 3101(b).

Congress expressly incorporated the Organic Act's delegation of authority over boating in ANILCA. 16 U.S.C. § 410hh-2 (The Secretary "shall administer the lands, waters and interests therein . . . as new areas of the National Park System under the Organic Act.").

Reading § 103(c) of ANILCA, 16 U.S.C. § 3103(c), to undo by implication what the rest of ANILCA expressly put into place—and kept in place—violates basic tenets of statutory construction. This case is not about Park Service regulation of private or state-owned inholdings, or the limits placed on Park Service authority over those inholdings by § 103(c) of

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[3] Pub. L. No. 94-458, 90 Stat. 1939 (Oct. 7, 1976), amending Act of August 25, 1916, Pub. L. No. 64-235, 39 Stat. 535 ("NPS Organic Act").

ANILCA. Development will not come to a halt on the 19 million acres of non-federal land within CSUs if the regulation challenged by petitioner is upheld. Park Service restrictions on hovercraft put at issue only the agency's authority to regulate activities on navigable waters overlying state-owned submerged land within park boundaries.

Section 103(c) does not address the federal power to regulate navigable waters, a power that does not depend on ownership of the submerged land. Indeed, both the Submerged Lands Act (SLA) and ANILCA expressly reserve the federal power over navigation. Further, even if the federal power to regulate navigable waters depended on the existence of a federal property interest of some sort—and it does not—such an interest clearly exists in the federal reserved water rights the United States has retained in the waters involved in this case. *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

The authority of the Park Service over navigable waters within the parks is critical to the parks fulfilling the purposes for which they were established. The Park Service regulates activities on navigable waters to accomplish those purposes. Consideration of actual instances of regulation within specific CSUs demonstrates why that authority is essential. If the Park Service did not have regulatory authority over navigable waters within the parks, ANILCA's mandate to protect these areas would be impossible to fulfill.

ARGUMENT

I. THE CHALLENGED REGULATION IS PROPER UNDER THE LONG-STANDING AUTHORITY OF THE NATIONAL PARK SERVICE TO REGULATE NAVIGABLE WATERS WITHIN PARK BOUNDARIES

Congress has the power to regulate navigable waters within the National Park System and other federal lands pursuant to the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, and the Commerce Clause, U.S. CONST. art. I, § 8, cl. 2. This authority does not depend on federal ownership of the submerged land.

Under the Property Clause, Congress has "the power to determine what are 'needful' rules 'respecting' the public lands." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). This power is entrusted to Congress "without limitations" and "is broad enough to reach beyond territorial limits." *Id.* at 538–39; *see also United States v. Alford*, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."). This necessarily includes the regulation of activities within park boundaries that could interfere with a park's purposes.

The Commerce Clause confers on Congress the power to regulate commerce, which this Court has found includes control of "all the navigable waters of the United States. . . . For this purpose they are the public property of the nation . . . ." *United States v. Rands*, 389 U.S. 121, 122–23 (1967). This power is unaffected by State or private ownership of the submerged land, *id.* at 123, and is "as broad as the needs of commerce," extending beyond the regulation

of navigation itself. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940).

The profound national interest in navigable waters was recognized as early as the Northwest Ordinance of 1787, which provided that "the navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free." Northwest Ordinance of 1787, 1 Stat. 50, 52 (1789) (reenactment of Ordinance by first Congress). Since then, this Court has regularly upheld federal actions on navigable waters, notwithstanding state ownership of the submerged land. Examples include the licensing of dams, *First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n*, 328 U.S. 152 (1946); the regulation of fishing, *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977); the recognition of Indian fishing rights, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); and the reservation of waters for Indian tribes, national recreation areas, and national wildlife refuges, *Arizona v. California*, 373 U.S. 546, 597–601 (1963). Management of navigable waters—irrespective of state ownership of the submerged land—is one of the oldest, most traditional, and most well-established of all federal powers. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (referring to Congress' "traditional jurisdiction" over navigable waters).

The national interest in navigation is also reflected in the Submerged Lands Act (SLA), enacted in 1953. The SLA confirmed the transfer of the river bottoms to the states but it did not pass title to the waters themselves. 43 U.S.C. § 1311(a). It explicitly provided that "nothing" in the statute "shall affect . . . any rights of the United States . . . under the

constitutional authority . . . to regulate . . . navigation." *Id.* § 1311(d); *see also id.* § 1314(a). The federal government's power to regulate navigation was unaffected by the transfer of the submerged lands to the states. This fact is fatal to petitioner's case.

The federal government's authority over navigable waters was also preserved by the Park Service's Organic Act. Congress delegated to the Park Service the authority to manage the parks "to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a). Congress directed the Park Service to promulgate regulations "concerning boating and other activities on or relating to water located within System units." 54 U.S.C. § 100751(b). The legislative history makes clear that, through this provision, Congress sought to give the Park Service the authority to regulate activities "on *any waters* within the system." H.R. REP. NO. 94-1569, at 6 (1976) (emphasis added), *reprinted in* 1976 U.S.C.C.A.N. 4290, 4292.[4]

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[4] Outside the context of Alaska and ANILCA, the general power of the Park Service and other federal land management agencies to regulate activities on navigable waters within federally-owned public lands has been repeatedly upheld, notwithstanding state ownership of the underlying submerged land. *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977) (upholding a regulation that prohibited hunting on waters within park boundaries, even where the state owns the submerged land); *United States v. Armstrong*, 186 F.3d 1055 (8th Cir. 1999) (recognizing that Congress had authority under both the Property and Commerce

The regulation banning hovercraft within all National Parks was promulgated under this explicit statutory authority and under the Park Service's general authority to make regulations "necessary or proper for the use and management" of the National Park System. 54 U.S.C. § 100751(a); *see also* General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30252 (June 30, 1983) (issuing regulations pursuant to 54 U.S.C. § 100751 (formerly 16 U.S.C. §§ 1a–2(h), 3)).

II. ANILCA PRESERVES THE NATIONAL PARK SERVICE'S AUTHORITY TO REGULATE NAVIGABLE WATERS OVERLYING STATE-OWNED SUBMERGED LAND

ANILCA preserves the Park Service's statutory authority under 54 U.S.C. § 100751 to regulate navigable waters within national parks in Alaska. ANILCA includes numerous provisions that indicate Congress intended the Park Service to regulate navigable waters within CSUs regardless of ownership of the submerged land. And it lacks any

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Clauses to enact the statutory provision that directs the Park Service to regulate tour boat operators within Voyageurs National Park); *Minnesota ex rel. Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981) (upholding federal restrictions on the use of motorboats over state-owned submerged land in the Boundary Waters Canoe Area Wilderness of the Superior National Forest); *United States v. Hells Canyon Guide Serv., Inc.*, 660 F.2d 735 (9th Cir. 1981) (U.S. Forest Service has regulatory authority over navigable waters overlying state-owned submerged land in Hells Canyon National Recreation Area); *United States v. Moore*, 640 F. Supp. 164 (S.D. W. Va. 1986) (enjoining West Virginia from spraying pesticides within the boundaries of the New River Gorge National River without a Park Service permit, despite the State's ownership of the submerged land).

indication—in § 103(c) or anywhere else—that Congress intended to restrict the power of the United States with respect to the regulation of water resources. Congress would not have directed the Park Service to regulate activities on navigable waters, or established CSUs expressly to protect rivers, while at the same time revoking the agencies' authority to do so. The Court "cannot impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *United States v. Raddatz*, 447 U.S. 667, 676 n.3 (1980) (quoting *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947)).

ANILCA explicitly preserves pre-existing federal authority to regulate activities to protect the parks. Congress provided that—subject to specific exceptions—nothing in ANILCA "is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands." 16 U.S.C. § 3202(b). Congress also kept in place all pre-ANILCA federal authority to regulate activities on navigable waters. *Id.* § 3207("Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States . . ."). Congress did this to "clarif[y] that the Act does not affect the jurisdiction of the State of Alaska and the federal government as such jurisdiction relates to the appropriation, control, or development of water resources." S. REP. No. 96-413, at 175 (1979).

More specifically, ANILCA directs the Park Service and other federal agencies to regulate motorboating and other forms of transportation on rivers. *See* 16 U.S.C. § 3170(a). The requirement that federal agencies allow snowmachines, motorboats, and airplanes within CSUs for "traditional activities" and "for travel to and from villages and homesites"

demonstrates that Congress intended the agencies to have regulatory authority over navigable waters. *Ibid.*[5] Another provision of ANILCA, focused on protecting the use of motorboats and other surface transportation for subsistence purposes, likewise makes those uses "subject to reasonable regulation." *Id.* § 3121(b). In short, Congress, in ANILCA, specifically directed use of the federal agencies' authority to regulate activities like motorboating to "protect the natural and other values" of the CSUs. *Id.* § 3170(a).

Further, Congress established many of the CSUs specifically to protect rivers and the values associated with them, such as fish and wildlife, recreation, and subsistence uses. Congress emphasized, in both the statute and the legislative history, the importance to the parks of numerous rivers, and it never distinguished waters where the state owns the submerged land. Rather, Congress passed ANILCA, in part, to preserve "freeflowing rivers" and the ability to canoe and fish on those rivers. *Id.* § 3101(b).

To accomplish this, Congress established ten new Park Service units, twenty-six wild and scenic rivers, and other federal reservations in Alaska. Congress established all of the new parks to "protect these splendid lands and waters" and to provide unique

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[5] Accordingly, the argument made by the Safari Club that float plane access will be barred by the Ninth Circuit's ruling is baseless. Br. of *Amicus Curiae* Safari Club International In Support of Pet'r 5, 12-15. In addition to 16 U.S. C. § 3170(a), ANILCA specifically requires the Park Service to allow "aircraft to continue to land at sites in the Upper Charley River watershed" within the Preserve except when such use "would be inconsistent with the purposes of the preserve." *Id.* § 410hh(10).

recreational opportunities, "ranging from the solitude and challenge of remote wilderness to . . . rafting down a crystal clear river." S. REP. No. 96-413, at 10. Four of the ten new national parks were established—and one of the three previously-existing parks expanded—to specifically protect identified rivers. Congress designated the Aniakchak River and other lakes and streams for protection "in their natural state" within the Aniakchak National Monument. 16 U.S.C. § 410hh(1). Congress specifically included the Kobuk, Salmon, and other rivers in the Kobuk Valley National Park to "maintain the environmental integrity" of the rivers "in an undeveloped state." *Id.* § 410hh(6); S. REP. No. 96-413, at 19 (indicating Congress included the Salmon River to preserve its wild character). Likewise, Congress tasked the Park Service with maintaining "the environmental integrity of the Noatak River" in the Noatak National Preserve, assuring that it is "unimpaired by adverse human activity," 16 U.S.C. § 410hh(8)(a), and the entire Charley River basin including streams, lakes, and other natural features, in its undeveloped natural condition in the Yukon-Charley Rivers National Preserve. *Id.* § 410hh(10). And Congress expressly expanded Glacier Bay National Monument and established Glacier Bay National Preserve to protect part of the Alsek River, *id.* § 410hh-1(1), which Congress found "has high potential for white water recreation and is a major international natural resource." S. REP. No. 96-413, at 35.

Two of the new national parks were established to protect rivers more generally. Congress established Gates of the Arctic National Park and Preserve and Lake Clark National Park and Preserve to protect the "scenic beauty" of the lakes and "wild rivers" in their

"natural state." 16 U.S.C. §§ 410hh(4), 410hh(7)(a); *see also* S. REP. No. 96-413, at 19 (including the John River in Gates of the Arctic National Park because it is "critical" to protect its "natural and wilderness character"). And nine of the new national parks were established—and three expanded—specifically to protect fish and wildlife. 16 U.S.C. §§ 410hh(1)–(4), (6)–(10), 410hh-1. Congress recognized the necessity of protecting "[p]ristine watersheds" for fish habitat. S. REP. No. 96-413, at 36 (including the headwaters of the Alagnak River and Nonvianuk Lake in the additions to the Katmai National Park and Preserve). The stated purposes of these reservations necessarily require that the Park Service have the authority to regulate activities on navigable waters within the parks.

Specific to the facts of petitioner's case, ANILCA's provisions and legislative history demonstrate congressional intent that the Park Service regulate navigable waters within the Yukon-Charley Rivers National Preserve (Preserve). The Park Service calculates that the Preserve protects 128 miles of the Yukon River and all 106 miles of the Charley River, plus the entire Charley River watershed. *See Yukon-Charley Rivers: What is Yukon Charley Rivers?*, NAT'L PARK SERV., http://www.nps.gov/yuch/what-is-yukon-charley-rivers.htm (last visited Aug. 14, 2018). Congress emphasized that the Yukon and Charley Rivers are "nationally significant," and it described the Charley as "what may be the best wild river in the state of Alaska" and "one of Alaska's best whitewater rivers." S. REP. No. 96-413, at 32–33 (noting that the Charley River is an outstanding resource that made designating the Preserve "clearly in the national interest" and that boating on the Charley River and its

tributaries "will provide high quality experiences for visitors").

Congress directed the Park Service to manage the navigable waters of the Preserve to, among other things, "protect habitat for, and populations of, fish and wildlife" and to "maintain the environmental integrity of the entire Charley River basin, including streams, lakes, and other natural features, in its undeveloped natural condition." 16 U.S.C. § 410hh(10); S. REP. No. 96-413, at 33 (anticipating federal control over rivers within the boundaries of the Preserve and noting that "the National Park Service is the appropriate management agency for the area").

The Yukon and Charley Rivers and their tributaries form the heart of the Preserve, with most park activities occurring on or alongside these rivers. *See Yukon-Charley Rivers: Plan Your Visit*, NAT'L PARK SERV., http://www.nps.gov/yuch/planyourvisit/index.htm (last visited Aug. 14, 2018); *see also* H.R. REP. No. 96-97, pt. 1, at 207 (1979) ("The Yukon River corridor [is where] . . . most of the visitor use of the preserve and wilderness is expected to occur. The Secretary should take into consideration the designation of a suitable landing location or locations within the Yukon-Charley for the purpose of public access to the river.").[6] The Nation River, where

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[6] The logical consequences of petitioner's contentions would be to bar the Park Service from regulating navigation on the Yukon River within the Preserve. That result would be particularly strange, given the Yukon River's 2,400 mile length, and its historic role as an avenue of commerce extending more than 700 miles into Canada. *See Yukon River*, YUKON INFO, www.yukoninfo.com/yukon-river/ (last visited Aug. 14, 2018).

petitioner was approached by Park Service officials, lies partially within the Preserve, flowing from well beyond the Canadian border to the Yukon River.[7] *Sturgeon v. Masica*, 768 F.3d 1066, 1070 (9th Cir. 2014) ("The lower six miles of the Nation River lie within the Yukon-Charley Rivers National Preserve . . . ."). To access the Nation via the Yukon, one must travel through the Preserve. *See* Map at A1.

Congress' attention in ANILCA to protecting waterways extended beyond the national parks. Congress added twenty-six rivers to the National Wild and Scenic Rivers System, directing the Secretary of the Interior to administer them. 16 U.S.C. § 1274(a)(25)–(50). Thirteen of these designations are for rivers within National Parks, *id.* § 1274(a)(25)–(37), and six are for rivers within National Wildlife Refuges, *id.* §1274(a)(38)–(43). Under the Wild and Scenic Rivers Act, all of these rivers must be "administered . . . to protect and enhance the values which caused [them] to be included." *Id.* § 1281(a). Also, the Wild and Scenic Rivers Act specifically contemplates concurrent federal and state jurisdiction over the rivers, *id.* § 1281(e), but provides that state jurisdiction may not be exercised in a way that impairs the protection of the rivers, *id.* § 1284(d).

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[7] The Nation River's origin in Canada is relevant because under the equal footing doctrine, as implemented by the Submerged Lands Act, a state may allocate and govern the bottoms of navigable rivers according to state law, but subject to the United States' power "to control such waters for purposes of navigation in interstate and foreign commerce." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012) (quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935)).

The Wild and Scenic Rivers Act explicitly gives federal agencies the authority to limit hunting otherwise allowed by the State "for reasons of public safety, administration, or public use and enjoyment." *Id.* § 1284(a). Under petitioner's reasoning, all of the Wild and Scenic Rivers where the State owns the submerged land would no longer be subject to these requirements. This would make ANILCA's addition of many—if not all—of the rivers to the National Wild and Scenic Rivers System meaningless by removing the Secretary of the Interior's ability to protect them as mandated by Congress. This would result in the "paralyzing hand" this Court cautioned against in *Raddatz*, 447 U.S. at 676 n.3. And if § 103(c) is held to have repealed federal authority to regulate navigable waters overlying state-owned submerged land within CSUs, it would have the incongruous result that navigable rivers flowing through federal lands in Alaska outside CSUs where petitioner's strained reading of § 103(c) would not apply—such as in the Chugach National Forest and the unreserved land managed by the Bureau of Land Management—would be subject to federal regulation while rivers designated under the Wild and Scenic Rivers Act would not.

Notwithstanding the centuries-old federal constitutional power to regulate navigable waters, and the explicit statutory language preserving that authority, 43 U.S.C. § 1311(d), 54 U.S.C. § 100751(b), 16 U.S.C. §§ 3170(a), 3207, petitioner contends that § 103(c) took away that power by implication. Section 103(c) never discusses the federal power to regulate navigable waters. Congress would not have directed the Park Service to protect specific rivers or directed the Park Service to regulate activities on navigable

waters, while at the same time, and in the same statute, taking away all Park Service regulatory authority over those waters.

Petitioner claims section 103(c) of ANILCA and Alaska's "superior" claim of title to the water in navigable rivers means that those waters are not public lands, and the Park Service may not regulate them pursuant to its general authority to manage national parks. Petr. Br. at 26–28.[8] But the federal power to regulate navigable waters does not depend on who owns the bottom of a river or lake.[9] As this Court long ago stated, *Rands*, 389 U.S. at 127, the transfer of submerged lands to states, "left congressional power

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[8] Amici join in the government's alternative argument that regulation of navigable rivers within National Park System units is also provided for through the federal reserved water rights the federal government retained when the park units were withdrawn for conservation purposes. Respondent's Br. at 32–37.

[9] To the extent that any property interest is required, the Government is correct, Respondent's Br. 32–37, that the United States owns federal reserved water rights (FRWRs) in some navigable waters in Alaska—both inside and outside of CSUs. *John v. United States*, 720 F.3d 1214, 1221–22 (9th Cir. 2013), *cert. denied* 134 S. Ct. 1759 (2014). This property interest arises both in the area of federal subsistence management, *ibid*, and regarding federal lands reserved for conservation purposes. *Cappaert*, 426 U.S. at 138. Were it relevant or necessary to the disposition of this case—and it is not—this fact would require the conclusion, as the Secretaries of the Interior and Agriculture have determined, that all navigable and non-navigable waters within 34 CSUs, including Yukon-Charley Rivers National Preserve, are federal "public lands" within the meaning of ANILCA, because the FRWRs are property "interests" in the "waters." 16 U.S.C. § 3102(1)–(3) (defining "public lands" as "lands, waters, and interests therein," "the title to which is in the United States.").

over commerce and the dominant navigational servitude of the United States precisely where it found them." Under the SLA, Alaska received neither ownership of the navigable waters, *see United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913), nor the right to exclusively regulate them. *United States v. California*, 436 U.S. 32, 41 n.18 (1978). *Amici* are not aware of a single reported decision in which the federal government's Property Clause and Commerce Clause management authority over navigable waters was held to be subordinated to, or displaced by, state ownership of the submerged land. Such a result would upend the Constitution and more than 200 years of constitutional history.

ANILCA must be read "to give the Act the most harmonious, comprehensive meaning possible." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631–32 (1973) (quoting *Clark*, 332 U.S. at 488). Here, that reading is that ANILCA preserves federal authority over navigable waters within CSUs, allowing application of the Park Service's prohibition of hovercraft within the parks.

III. The National Park Service Must Have The Power to Regulate The Navigable Waters To Achieve The Purposes For Which Congress Established The Parks

Recognizing that the rivers are essential to the lands it manages and to achieving Congress' objectives for preserving those lands, the Park Service regulates activities on navigable waters overlying state-owned submerged land within the parks according to the purposes for which they were established. Examples include prohibiting hovercraft and managing visitation for particularly popular rivers to maintain

the rivers' and the parks' character. The Park Service also relies on its own travel on the navigable rivers to enforce its regulations that apply park-wide.

The Park Service's prohibition of hovercraft within the parks is a necessary regulation of navigation to protect park resources and the visitor experience. In 1983, the Park Service adopted regulations that prohibit hovercraft to protect the Park System. 36 C.F.R. § 2.17(e). Personal hovercraft are generally 10–20 feet long, but can be significantly larger; some hovercraft can carry 100 people. Hovercraft are noisy, and most models are louder than the maximum noise level allowed by Park Service regulations for vessels. *See* 36 C.F.R. § 3.15(a) (vessels must operate below 75 dB(a)); *Hovercraft Environment*, HOVERCRAFT.ORG, www. hovercraft.org/hovercraft-environment/ (last visited Aug. 19, 2018) ("modern hovercraft typically reach levels of up to 80 decibels"). The Park Service prohibited hovercraft "because they provide virtually unlimited access to park areas and introduce a mechanical mode of transportation into locations where the intrusion of motorized equipment by sight or sound is generally inappropriate." General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30252, 30258. Because hovercraft travel on a cushion of air, they are not limited to waterways, as are traditional boats. *Ibid.* Rather, they can move over mudflats, wetlands, gravel bars, and mild rapids, accessing areas not generally considered navigable by motorized boats. And that is why petitioner desires to use his hovercraft within the Preserve: to reach areas that are inaccessible by other watercraft. Pet'r's Opening Br. at 13; Robin Bravender, *National Parks: Moose Hunter's Unlikely Path to the Supreme Court*, GREENWIRE, Nov. 23, 2015,

www.eenews.net/stories /1060028460/ (last visited Aug. 14, 2018) (the hovercraft "allowed [Sturgeon] to travel over gravel bars and shallow areas. . . . [In a jet boat, Sturgeon] can't get up the river as far as [he] normally do[es] [in the hovercraft], and some years [he] can't get up it at all.").

The Park Service also regulates specific rivers to reduce resource impacts and protect the parks. For example, the Park Service imposes strict guidelines to reduce resource impacts and retain a wilderness experience on the Alsek River in Glacier Bay National Park. *See* 36 C.F.R. § 13.1108. The Alsek is a popular and nationally-known river for week-long or longer rafting trips in remote wilderness. Park Service permits are required to float the Alsek. *Id.* § 13.1108(a). Only one trip is allowed to start each day, and the waiting list for a private permit is several years long. The Park Service limits group size and the length of time visitors can stay at popular camp spots, and requires visitors to carry out all trash, including human waste. 36 C.F.R. § 13.1108(b)–(e). These regulations are in place to protect the park, the river, and the visitor experience.

Revoking the Park Service's authority over navigable waters would cripple the Park Service's enforcement abilities. In many parks in Alaska, the navigable rivers form the major transportation corridors, akin to roads in the parks in the contiguous United States. For example, the Yukon River in the Preserve is how the majority of visitors travel through the Preserve. *Yukon-Charley Rivers: Plan Your Visit*, NAT'L PARK SERV., http://www.nps.gov/yuch/planyourvisit/indcx.htm (last visited Aug. 14, 2018). Similarly, the Park Service uses the Yukon River to travel within the Preserve to enforce Park Service

regulations, both on and off the river. *See, e.g.*, NAT'L PARK SERV., Winter Patrols in Yukon-Charley Rivers, http://www.nps.gov/yuch/learn/news/upload/YUCHWinterPatrols2-fixed.pdf (last visited Aug. 19, 2018) (indicating that winter patrols are centered around the Yukon River).

Other park resources and visitor experiences would be significantly impaired if the Park Service were barred from enforcing its regulations on navigable waters. The Park Service may be unable to implement seasonal closures to ensure passage of king salmon into Canada to fulfill international treaty obligations, *see* 16 U.S.C. §§ 5701–5727, to prevent the dumping of trash or fuel into the waterway, or to enforce subsistence hunting and fishing regulations when violations occur on the water. In short, without having the ability to enforce regulations on navigable waters, the Park Service could be significantly constrained in protecting parks, especially in those parks where the majority of public use occurs on those waters.

* * *

Amici urge the Court to affirm the Court of Appeals' decision. The power of the Park Service to regulate navigable waters in parks is constitutionally based, and has been delegated and preserved by numerous statutes, including ANILCA. Reading § 103(c) of ANILCA to impliedly repeal this authority would have far-reaching consequences, significantly reducing the federal agencies' ability to protect CSUs for the purposes for which Congress set them aside. ANILCA is properly read to keep in place the Park Service's authority over navigable waters. The remainder of issues implicated by petitioner's question presented, regarding the reach of § 103(c)'s limitations

on the regulation of State, Native Corporation, and private inholdings, are not at issue.

CONCLUSION

For the foregoing reasons, and those set forth by the government, the decision of the court of appeals should be affirmed.

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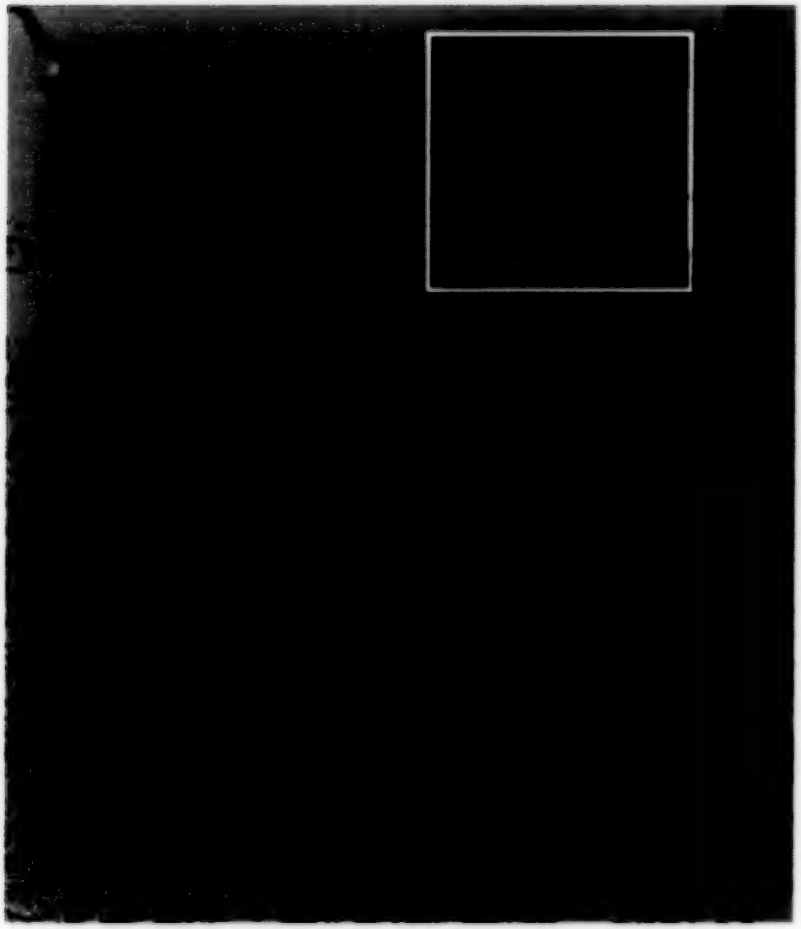
APPENDIX

A1



No. 17-949

In the
Supreme Court of the United States

JOHN STURGEON,
Petitioner,

v.

BERT FROST, in his official capacity as Alaska Regional Director of the National Park Service, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Alaska National Interest Lands Conservation Act prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska.

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this amicus curiae brief in support of the Petitioner.[1]

PLF is the nation's most experienced public interest legal organization defending the constitutional principle of federalism in the arena of environmental law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases in this Court involving important issues of federalism, water law, and environmental regulation. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018); *United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013); *Sackett v. EPA*, 566 U.S. 120 (2012); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009); *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001).

This brief discusses the importance of cabining the federal reserved water rights doctrine and applying the "plain statement rule," to safeguard federalism and ensure public access to natural resources in Alaska and throughout the nation. This case is a matter of utmost significance for Alaska's

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[1] All parties have been given timely notice of PLF's intent to participate in this case as amicus curiae, and all parties have consented to the filing of this brief. PLF affirms under Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

residents, who are prevented from accessing many of their State's waterways with effective craft such as hovercraft, as a result of the decision below. More broadly, the decision below is applicable nationally insofar as it holds, in reliance on an erroneous Ninth Circuit precedent, that National Parks generally have appurtenant implied reserved water rights resulting from those Parks' conservation purposes.

SUMMARY OF ARGUMENT

As a result of the Ninth Circuit's decision in this case and its prior erroneous decision in *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995), the Park Service has been granted implied federal reserved water rights, not just in Alaska but effectively nationwide, for protection of the conservation purposes of the National Parks. This will disrupt use of State-owned navigable waterways wherever they transit National Parks and potentially other federal enclaves, upending Congress' normal respect for and restraint toward state regulation of natural resources and use of waters. The harm in this particular case will certainly spread to all National Parks in the lower 48. Here, the Park Service has asserted sweeping authority to regulate hovercraft travel for any purpose, including recreational and subsistence hunting and fishing, on most of Alaska's waterways. Given the importance of river travel in Alaska's many remote areas, and the role of hovercraft in that task, this amounts to a federal takeover of transportation management in much of Alaska. The Ninth Circuit upheld the Park Service's prohibition on traveling with a hovercraft on the Nation River despite this Court's precedent, which clearly establishes three principles that should control here: (1) States retain

primary authority over regulation of waterways within their borders; (2) federal legislation will not be construed to displace the States' authority over regulation of waters in the absence of a plain statement from Congress that such displacement is intended; and (3) courts will not find implied federal reserved water rights that allow for federal regulation of State-owned waterways without a clear statutory basis for establishing and quantifying those rights.

The decision below conflicts with all three rules. The Ninth Circuit upheld expansive federal regulation of the use of hovercraft on Alaska's waterways without clear direction from Congress in the Alaska National Interest Lands Conservation Act (ANILCA), or any statutory basis for determining whether ANILCA reserved water rights to the Park Service. Now, as a result of the lower court's opinion, Alaska residents find that they no longer enjoy full access to their State's waterways, despite State laws allowing such access. By extension, similar crises will migrate to all the units of the National Park system, nationwide. The crisis in federalism presented in this case demands this Court's action to restore balance.

In addition to reversing the decision below, this Court should abrogate the Ninth Circuit's decision in *Alaska v. Babbitt*, which is the source of the mischief in this case on the issue of federal reserved water rights.

ARGUMENT

The authority to regulate navigable waters is among the most fundamental powers reserved to each State. *United States v. Alaska*, 521 U.S. 1, 5 (1997) (holding power to control navigation is "essential

attribute of sovereignty"); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (acknowledging State sovereignty over natural resources).

Since the passage of ANILCA, however, the federal government has loomed large over Alaska's natural resources. 16 U.S.C. § 3101, et seq. *See, e.g., John v. United States*, 720 F.3d 1214, 1223 (9th Cir. 2013) (upholding subsistence hunting and fishing regulations under ANILCA). The regulation at issue is being applied to prevent Alaskans from accessing non-federal land in either side of federal enclaves via State-owned waterways. The Ninth Circuit's holding that the existence of a federal reserved water right under ANILCA in the Nation River allows such regulation is applicable to all Alaska navigable waterways that transit National Parks and other federal enclaves established by ANILCA. The hovercraft regulation thus impacts travel on all navigable and non-navigable waters within and appurtenant to 34 federal areas in Alaska, accounting for a large portion of the State. But such waters should fall only under the regulatory purview of the State of Alaska. It is well-established that the State owns the land underlying those waters. *Alaska*, 521 U.S. at 5 ("[N]ew States are admitted to the Union on an 'equal footing' with the original 13 Colonies and succeed to the United States' title to the beds of navigable waters within their boundaries."). And, as this Court has held, a State's authority to govern the use of its navigable waters is a fundamental aspect of sovereignty. *Id.*; *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Coyle v. Smith*, 221 U.S. 559, 573 (1911). The Ninth Circuit, however, concluded that ANILCA supersedes Alaska's authority over its own navigable

waterways through the federal implied reserved water rights doctrine. *Sturgeon v. Frost*, 872 F.3d 927, 932-35 (9th Cir. 2017) (Ninth Circuit bound by its prior decision in *Alaska v. Babbitt* to recognize federal reserved water right in Nation River arising under ANILCA).

This case involves two supremely important questions of law that affect the balance of State and federal authority: may the federal government intrude on traditional State sovereign rights without a plain statement from Congress that such intrusion is intended; and does the federal reserved water rights doctrine award unlimited authority to federal agencies to regulate State resources?

I

CONSTRUING ANILCA TO TAKE OVER ALASKA'S WATERWAYS CONFLICTS WITH THIS COURT'S OPINIONS REGARDING CONGRESSIONAL INTENT

The hovercraft rule infringes on Alaska's traditional authority to regulate navigation on the State's waters. But it is not clear that Congress intended ANILCA and the hovercraft rule to apply to State-owned waterways at all. Moreover, this Court has on many occasions held that States retain authority to regulate the use of navigable waters, unless Congress enacts laws that plainly demonstrate an intent to supersede State regulation. *Solid Waste Agency*, 531 U.S. at 172-74; *Montana v. United States*, 450 U.S. 544, 552 (1981); *see Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *United States v. Bass*, 404 U.S. 336, 349-50 (1971); cf. *John v. United States*, 247

F.3d 1032, 1044 (9th Cir. 2001) (en banc) (Kozinski, J., dissenting). The Ninth Circuit's opinion upholding the hovercraft rule conflicts with this Court's opinions applying the plain statement doctrine where federal regulations threaten to upset the distribution of power between State and federal authorities.

In *Solid Waste Agency*, this Court explained that it will not afford deference to a federal agency's interpretation of a statute when that interpretation "alters the federal-state framework by permitting federal encroachment upon a traditional state power." 531 U.S. at 173 ("'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.'") (quoting Bass, 404 U.S. at 349). *Solid Waste Agency* involved the Army Corps of Engineers' attempt to extend federal Clean Water Act jurisdiction to non-navigable, isolated, intrastate waters through a policy called the "migratory bird rule." 531 U.S. at 164. Applying the plain statement doctrine, the Court rejected the migratory bird rule, because it was not clear that the text of the Clean Water Act encompassed such a rule, and the rule would "result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174 (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)).

The Court reaffirmed the *Solid Waste Agency* principle in a unanimous opinion in *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120 (2013). There, the Court held that "ownership of submerged land, and the accompanying power to control navigation, fishing, and other public uses of water, 'is an essential attribute of sovereignty' " for each State.

Id. at 2132 (quoting *Alaska*, 521 U.S. at 5). The Court thus ruled that a "strong presumption" applies against defeat of State regulation of navigable waters. *Id.* (quoting *Montana*, 450 U.S. at 552).

Applying the plain statement rule in this case demonstrates that the Court should reverse the lower court's opinion. Whether ANILCA applies to Alaska's waterways is not plainly discernable from the statute. *Babbitt*, 72 F.3d at 701-02. ANILCA does not address navigable waters; instead, the statute focuses on "public lands." 16 U.S.C. § 3102. The Ninth Circuit has held that "public lands [under ANILCA] are lands, waters, and interests therein, the title to which is in the United States." *Babbitt*, 72 F.3d at 702 (emphasis added). But the Ninth Circuit's *Babbitt* definition only muddies the waters. As Judge Kozinski wrote in dissent in *John v. United States*, 247 F.3d at 1047, ANILCA does not clearly create any interest in which the United States holds "title." In fact, even if ANILCA did reserve some water rights to the federal government—a disputed contention here—the government's interest in those rights is only usufructuary; it does not give the United States title to anything, and, therefore, does not mean the hovercraft rule applies to State-owned waterways. "[T]he United States cannot hold title to . . . reserved water rights." *Totemoff v. Alaska*, 905 P.2d 954, 965 (Alaska 1995) (contrasting property interests in which title can be held with other interests in property).

ANILCA does not clearly establish that the hovercraft rule applies to State-owned waterways in Alaska. In such circumstances, this Court has instructed lower courts to construe federal statutes so as not to invade State sovereignty. The Ninth Circuit

did the opposite by construing ANILCA to apply to Alaska's waterways. That decision conflicts with this Court's opinions applying the plain statement rule, and the Court should therefore reverse.

II

CONSTRUING ANILCA TO TAKE OVER ALASKA'S WATERWAYS IMPERMISSIBLY EXPANDS THE IMPLIED RESERVED WATER RIGHTS DOCTRINE

The Ninth Circuit upheld the hovercraft rule based on the notion that the implied reserved water rights doctrine allows the Respondents to control Alaskan waters where they run through or next to federal areas created by ANILCA. *Sturgeon*, 872 F.3d at 932-35. However, the lower court's decision conflicts with this Court's opinions on the reserved water rights doctrine in two fundamental respects: this Court has never applied the doctrine in the absence of a clear statutory basis for identifying and quantifying federal water rights; and this Court has never implied the reservation of a federal water right by applying *Chevron*[2] deference to an agency's interpretation of the applicable statute, as the Ninth Circuit did in its prior decision in *Alaska v. Babbitt*, which the panel below insisted it was bound by.

The federal reserved water rights doctrine is based on the principle that Congress, when granting a federal agency "the power to reserve portions of the federal domain for specific federal purposes,"

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[2] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

authorizes the reservation of rights to appurtenant water "'to the extent needed to accomplish the purpose of the reservation.'" *United States v. New Mexico*, 438 U.S. 696, 700 (1978) (quoting *Cappaert v. United States*, 426 U.S. 128, 138 (1976)). The doctrine is subject to important limits. Critically, this Court has explicitly held that courts may find implied federal reserved water rights only upon careful examination of the statutory text and legislative history of the act that set aside the federal land in question. *New Mexico*, 438 U.S. at 700-02; *Cappaert*, 426 U.S. at 139-41. And there is no basis in this Court's jurisprudence for relying on or even considering a federal agency's interpretation of such legislation when determining whether federal water rights have been reserved. *New Mexico*, 438 U.S. at 715 (a federal reserved water right will not be implied when statutory text and legislative history are unclear). Quite the opposite: for *Chevron* deference to apply, the interpreted statute must be ambiguous, which automatically defeats the federal government's claim of an implied reserved water right. The moment the Ninth Circuit found itself, in *Alaska v. Babbitt*, discussing the views of the administering bureaucracy, it should have stopped and ruled against the government as to implied reserved water rights.

In *Cappaert*, the federal government sought to enjoin groundwater pumping by private parties on land near the Devil's Hole National Monument in Nevada, on the basis that the pumping impaired an implied federal reserved water right that was necessary to protect the endangered pupfish, which lives in a subterranean pool within the Monument. 426 U.S. at 135. In resolving the claim in favor of the United States, the Court examined the proclamation

reserving Devil's Hole itself, without reference to any agency interpretation of the proclamation or related statutes. *Id.* at 139-40. The Court held that the implied reserved water rights doctrine only extends to the "amount of water necessary to fulfill the purpose of the reservation, no more." *Id.* at 141 (citing *Arizona v. California*, 373 U.S. 546, 600-01 (1963)). The Court also examined the entire proclamation to determine that the amount of water reserved was the amount necessary to preserve the pupfish, and that the pool could be allowed to drop to just above that level without impairing the federal water right. *Cappaert*, 426 U.S. at 141.

In *New Mexico*, the Court affirmed a decision of the New Mexico Supreme Court that denied the United States Forest Service's claim to implied reserved water rights in the Gila National Forest for recreation, aesthetics, wildlife preservation, and cattle grazing. 438 U.S. at 697. The Court recalled that in all prior implied reserved rights cases where such a right was recognized, it had "carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." *Id.* at 700 (footnote omitted; emphasis added). "Careful examination" was necessary for two reasons: the claimed right was implied by the statute, rather than expressed therein, and there is a strong and near invariable history of congressional deference to state water law. *Id.* at 701-02. The Court reemphasized its caution that the implied reserved water rights "doctrine [is] built on implication and is an exception to Congress' explicit deference to state water law in other areas. Without legislative history to the

contrary, we are led to conclude that Congress did not intend . . . to reserve water . . . ." *Id.* at 715 (footnote omitted).

In stark contrast to *Cappaert* and *New Mexico*, the Ninth Circuit's opinion in *Alaska v. Babbitt*, relied upon in the opinion below, conceded that there is no clear statutory basis for a federal reservation of water rights in ANILCA, but then deferred to the federal Respondents' assertion that ANILCA impliedly reserved an indeterminate amount of water to the federal government. *Alaska v. Babbitt*, 72 F.3d at 702, *id.* at 703-04; *see also John v. United States*, 720 F.3d at 1221. Furthermore, in another case relying on *Alaska v. Babbitt*'s reserved water right holding, the Ninth Circuit left it up to the Park Service to quantify those rights. *John v. United States*, 720 F.3d at 1222. Yet this Court's opinions foreclose federal agencies from asserting reserved water rights where statutory text and legislative history do not clearly establish congressional intent to reserve such rights. *New Mexico*, 438 U.S. at 715.[3]

Alaska v. Babbitt also conflicts with state court decisions analyzing the scope of the federal reserved water rights doctrine. In *Potlatch Corp. v. United States*, 12 P.3d 1260 (Idaho 2000), the Idaho Supreme Court held that various congressional acts reserving wilderness areas in the State of Idaho did not

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[3] The Ninth Circuit has gone so far as to significantly recast this Court's test for implied reservations of water rights, *i.e.*, that the water use in question be "necessary" to prevent the complete frustration of the reservation's purpose, to merely whether the reservation "envisions the use of water." *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262, 1268-70 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017).

impliedly reserve any water rights to the federal government. *Id.* at 1268. The court expressly limited its examination to the relevant statutory text and legislative history. *Id.* at 1266, 1268. The *Potlatch* court also considered the absence of any "standard by which quantification of the amount of water could be determined" as indicative that no water was impliedly reserved. *Id.* at 1266. *Alaska v. Babbitt* directly conflicts with *Potlatch* by finding an implied reserved right where the Ninth Circuit conceded that the statute and legislative history alone did not support such a finding. *John*, 720 F.3d at 1221 n.41 (citing *Babbitt*, 72 F.3d at 702). *Alaska v. Babbitt* also contradicts *Potlatch* by finding an implied reserved right in the absence of any statutory basis for quantifying the right. *John*, 720 F.3d at 1222 (holding federal agencies responsible to identify scope of waters subject to implied reserved right).

Potlatch also demonstrates why an implied reservation of water rights in the Nation River is not necessary for the conservation purposes of the Yukon-Charley National Park or other federal conservation units. *Potlatch* holds that because the Wilderness Act itself regulates, and largely outright prevents, the land uses that are necessary to divert and convey water in order to appropriate water rights from sources within designated wilderness areas, no reservation of water is necessary to avoid the frustration of any wilderness area's primary purpose. 12 P.3d at 1266-67. This principle applies equally to the supposed federal reserved water right in this case. The purposes of the land reservation which the Ninth Circuit relied upon below are for conservation of the natural resources within the Park units. *Sturgeon*, 872 F.3d at 934 (citing ANILCA's purpose of

protecting scenic, natural, cultural and environmental values). Given the Park Service's broad ability to regulate the construction of new diversion works and rights of way through the National Parks it regulates, *San Juan County, Utah v. United States*, 754 F.3d 787, 791 (10th Cir. 2014) (reservation of Canyonlands National Park prevented new rights of way across Park), no reservation of water is necessary to prevent significant water diversions from frustrating ANILCA's scenic, natural, cultural, and environmental purposes.

Alaska v. Babbitt is also at odds with the decision of the Colorado Supreme Court in *United States v. Jesse*, which ruled that the United States Forest Service was not foreclosed by *New Mexico* from trying to prove its claim for implied reserved water rights for the Pike and San Isabel National Forests, based upon the primary purpose of the Forest Service Organic Act. 744 P.2d 491, 494 (Colo. 1987). The Colorado Supreme Court, sitting in review of a lower court grant of summary judgment against the Forest Service, remanded the case to the state's water court with clear instructions that such a claim was subject to "strict scrutiny" of the statutory purposes of the reservation. *Id.* at 503 (citing *New Mexico*, 438 U.S. at 700). *Jesse*, relying on *New Mexico*, also required that any implied reserved water right must be strictly limited to the amount necessary to prevent the entire defeat of the forest reservation. *Jesse*, 744 P.2d at 503. *Alaska v. Babbitt* and its progeny fall well short of either "strict scrutiny" or "careful examination" in finding implied reserved water rights in ANILCA. Rather than conducting any such searching inquiry, *Alaska v. Babbitt* simply asserts that ANILCA does the job, and any holes in the required analysis should

be filled in with judicial deference to agency interpretation. *Babbitt*, 72 F.3d at 703; *John*, 720 F.3d at 1221-22.

CONCLUSION

The Court should abrogate *Alaska v. Babbitt*'s holding as to implied reserved water rights, and reverse the decision below.

DATED: August, 2018.

Respectfully submitted,

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No. 17-949

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* SAFARI CLUB INTERNATIONAL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Safari Club International ("Safari Club") is a nonprofit corporation incorporated in the State of Arizona, operating under § 501(c)(4) of the Internal Revenue Code, with principal offices and places of business in Washington, D.C. and Tucson, Arizona and a membership of approximately 50,000. Safari Club's missions are the conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool. Safari Club carries out its conservation mission in part through its sister organization, Safari Club International Foundation.

Safari Club has long been involved in litigation and other advocacy efforts to promote hunting, access to hunting, and sustainable-use conservation, including hunting opportunities on federal and other lands in Alaska. For almost a decade, Safari Club pursued litigation to challenge the Federal Subsistence Board's administration of subsistence priorities for hunting and wildlife resources on federal lands in Alaska and the composition of the federal advisory councils that provided recommendations on the allocation of those priorities. *Safari Club Int'l et*

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1. The following is provided pursuant to Supreme Court Rule 37. No counsel for a party authored this brief in whole or in part, and no counsel for a party and no party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than named ***amicus curiae*** made a monetary contribution to this brief. Counsel of Record for Petitioner consented to the filing of ***amicus curiae*** briefs in support of either or of neither party. Counsel of Record for Respondents consented to the filing of this brief after receiving timely written notice from the ***amicus curiae***.

al. v. Demientieff et al. No. 98-0414 (D. Alaska, HRH). Currently, Safari Club, together with the State of Alaska and other non-governmental groups, is pursuing a case against Respondent, National Park Service ("NPS"), to challenge federal regulations that directly conflict with Alaska state regulations and prohibit forms of hunting on all National Preserves in Alaska. *State of Alaska v. Zinke et al.*, No. 3:17-cv-00014 (D. Alaska, SLG). In addition, Safari Club has participated or is currently participating in lawsuits involving, among other things, the listing and delisting of numerous species under the Endangered Species Act, states' authority and ability to manage wildlife populations via hunting, the ability of hunters to retrieve legally hunted animals from lands within National Forests, and the ability of hunters to import sport-hunted trophies into the U.S. from international hunts.

In this amicus brief, Safari Club will "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties." Sup. Ct. R. 37(1). This brief provides information that will "be of considerable help to the Court." *Id.* It includes the view of both resident and nonresident hunters who enjoy Alaska's world-class hunting resources and opportunities and who require transportation on the waters that exist within the boundaries of Conservation System Units ("CSUs") administered by the Respondent NPS.[2] Access to hunting

2. CSUs in Alaska include "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of [the Alaska National Interest Lands Conservation Act of 1980], additions to such units, and any such

areas and opportunities is of primary concern to Safari Club, its members, and many other hunters throughout the United States and the world. In Alaska, hunters often face significant obstacles to access hunting areas due to limited road coverage and the isolated nature of many valued hunting locations. Access to those opportunities depends upon hunters' ability to use all means of travel on rivers and other navigable waters in CSUs in Alaska. Safari Club and its members, along with the hunting community generally, seek to protect the full range of hunting and sustainable-use conservation opportunities available in Alaska.

SUMMARY OF THE ARGUMENT

Safari Club agrees with the arguments presented in Petitioner John Sturgeon's brief. The federal government does not hold title to the waterways at issue here. In the absence of title to the waterways that run within the CSUs, the NPS lacks the authority to regulate the use of those waterways. That authority lies with the State of Alaska.

Safari Club also agrees with Sturgeon that the reserved water rights doctrine provides no justification for the NPS's claim of regulatory authority in this case. Non-consumptive water uses, such as travel via hovercraft and other modes of transportation used by hunters that may be affected by the outcome of this case, do not have

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unit established, designated, or expanded hereafter." 16 U.S.C. § 3102(4); *see also* Petitioner Br. at 5–6. For the purposes of this brief, all references to CSUs include only those CSU lands administered by the NPS.

any demonstrable impact on the volume of water available to achieve the primary purposes for which the Yukon-Charley Rivers National Preserve was reserved. The "sight and sound" reasoning provided by the NPS when it adopted the restriction was not intended to sustain a certain volume of water within the Preserve, necessary to protect the Preserve's purposes. Further, because the NPS applies the hovercraft ban across the entire NPS System, a court cannot find that the ban applies to fulfill a purpose specific to the Yukon-Charley Rivers National Preserve, as is required for application of the reserved water rights doctrine.

The Ninth Circuit's ruling greatly expands the scope of the reserved water rights doctrine compared to this Court's previous holdings. Unless this Court overturns the decision below, the United States will have practically limitless authority over an innumerable number of waters in this country.

Had Congress wished to incorporate the waters within the CSUs, as it has done in many instances for other NPS units, it could have done so. The failure of Congress to expressly reserve the waters within the CSUs and place them within NPS authority demonstrates that the position of the Respondents and the ruling of the Ninth Circuit do not reflect Congressional intent.

The Court's ruling in this case will likely have an impact on whether hunters, guides, and outfitters, many of whom are Safari Club members, will be able to access congressionally-mandated recreational activities available within and outside the boundaries of federal lands in Alaska and other states.

The ability to access hunting areas is essential to the hunter. In Alaska, hunting opportunities are often found in isolated, difficult to reach places, to which there is no road access. A viable, and often the most viable, means of access to hunting locations is air travel by float plane. The NPS's decision, upheld by the Ninth Circuit, that the NPS has the authority to regulate activity on waters that exist within CSU boundaries, poses a severe threat to all who wish to hunt in these inaccessible locations. The NPS's interpretation of Section 103(c) triggers the application of 36 C.F.R. § 2.17(a) and its prohibition against the use of not only hovercraft but also aircraft on waters within Alaska's CSUs. The regulatory ban against float planes landing on the majority of those waters will make it impossible for both resident and non-resident hunters and their guides to reach many hunting locations within and around CSUs, including many National Preserves. Even though Congress mandated the authorization of hunting in Alaska's National Preserves, the NPS has thwarted Congress's directive by applying regulations in a way that undermines hunters' abilities to access and use National Preserves for hunting.

ARGUMENT

A. The Reserved Water Rights Doctrine is Inapposite to Sturgeon's Challenge to the Hovercraft Ban.

Although it is a critical aspect to the outcome of Mr. Sturgeon's controversy, determining whether the Nation River and other navigable waters in Alaska's CSUs are "public lands" is not necessary for this Court to dispatch with the Ninth Circuit's ill-reasoned use of the reserved water rights doctrine in this case. Sturgeon correctly

argues that "the hovercraft ban exceeds the scope of whatever reserved rights the United States might hold" in the Nation River. Petitioner Br. at 37. Sturgeon accurately describes the framework of the reserved water rights doctrine:

> The doctrine is premised on the federal government's need for ***actual use and withdrawal of a certain volume of water***; it applies where Congress sets aside land for a federal purpose but that purpose would be "entirely defeated" without the reserved water. *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

Id. (emphasis added). The doctrine provides no support for justifying a hovercraft ban on any water, let alone the Nation River or other Alaskan CSU waters. As a use of water that neither consumes nor harms the water, travel via hovercraft is not a type of use that can be prohibited in favor of any reserved water rights.

The previous cases to which this Court has applied the reserved water rights doctrine have involved appropriation of water such that the appropriated water is removed from the water system and not usable by anyone else. In these cases, the United States claimed a right to water at issue that would otherwise be withdrawn or diverted from the water system. *See e.g.*, *Nevada v. United States*, 463 U.S. 110, 117 (1983) (water at issue sourced from river used to irrigate Indian reservation and federal reclamation project); *New Mexico* 438 U.S. at 697, n.1 (1978) (controversy began as action to "enjoin alleged illegal diversions from the Rio Mimbres" for irrigation);

Cappaert v. United States, 426 U.S. 128, 133 (1976) (rancher was pumping groundwater from underground aquifer connected to Devil's Hole); *Winters v. United States*, 207 U.S. 564, 566 (1908) (water withdrawn from Milk River for irrigation).

Had Mr. Sturgeon been conducting some activity that removed or diverted significant volumes of water from the Nation River, to the detriment of the primary purposes of the Yukon-Charley Rivers National Preserve, then the NPS might have had an arguable basis for asserting a reserved water right to prevent such an appropriation of water. But, those facts do not exist in this case. John Sturgeon was traveling on the Nation River via his personal hovercraft, which hovers above the water on a cushion of air. "'Hovercraft' is defined as a device that is supported by a fan-generated air cushion." General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30252, 30258 (June 30, 1983). *See also*, Alaska Admin. Code tit. 11, § 20.990(7). Sturgeon's use of his hovercraft does not remove, appropriate or divert a demonstrable amount of water from the Nation River, and any other user can likewise use the water after Mr. Sturgeon hovers over it. The reserved water rights doctrine cannot be used to prohibit such non-consumptive activity

The NPS's own explanation for its reason to include a hovercraft prohibition in the regulations applicable to all NPS units proves that the prohibitions were not intended by the NPS to preserve a certain volume of water within any body of water. Although the restriction was not part of the proposed version of the regulations published in 1982 (47 Fed. Reg. 11598 (Mar. 17, 1982)), the NPS decided

to add a hovercraft prohibition to the final version to address alleged complaints about the "sight and sound" of the vehicles:

> A few commenters recommended that the Service prohibit the use of hovercraft in park areas. The National Park Service has adopted this suggestion. "Hovercraft" is defined as a device that is supported by a fan-generated air cushion. The Service has determined that hovercraft should be prohibited because they provide virtually unlimited access to park areas and introduce a mechanical mode of transportation into locations where the intrusion of motorized equipment by sight or sound is generally inappropriate. This is consistent with the Service's intent to control portable engines and motors under § 2.12. Hovercraft shall only be permitted pursuant to special regulations and only following a thorough analysis of their effect on park resources.

48 Fed. Reg. at 30258. As the NPS's decision to include a hovercraft restriction had nothing to do with any water-volume concern for fish or other park natural resources, or to any of the primary purposes of the Preserve, the reserved water rights doctrine cannot be implied or justify the restriction.

Additionally, the simple fact that the NPS's hovercraft ban applies to *all* NPS administered lands is determinative that the reserved water rights doctrine provides no authority for the ban. "Each time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully

examined both the asserted water right and the ***specific purposes for which the land was reserved*** . . . ." *New Mexico*, 438 U.S. at 700 (emphasis added). It is impossible for a court, after a careful and specific examination, to find a rationale for the application of a regulation to a specific unit when the regulation applies system-wide. Such an approach defies the specificity required for the application of the reserved water rights doctrine. The NPS's adoption of the system-wide hovercraft ban cannot satisfy a court's careful examination of any specific purpose for which any land was reserved, let alone a careful examination of the purposes for which the Yukon-Charley Rivers National Preserve was reserved. Notably, the Ninth Circuit did not conduct the required careful examination; doing so would have revealed that the hovercraft ban was not directed to fulfill a specific purpose of the Yukon-Charley Rivers National Preserve and consequently did not qualify for application of the reserved water rights doctrine.

B. The Ninth Circuit's Ruling Goes Well Beyond the Scope of Established Caselaw Regarding the Reserved Water Rights Doctrine.

If the Ninth Circuit's ruling is upheld, the reserved water rights doctrine's scope will be expanded far beyond this Court's previous holdings. The *amici* States appropriately described the Ninth Circuit's ruling as "particularly alarming" because it implies "that the United States' reserved water right extends to *all water on all navigable waters within the reservation*." States' Br. at 14, n.5 (emphasis in original). In fact, by the Ninth Circuit's logic, the United States could likely claim a reserved water right for *any water*, inside or outside the reservation, navigable or non-navigable, so long as the water is hydrologically connected to the reservation.

This Court has held that the United States can hold an implied reserved water right in non-navigable, off-reservation water. *Cappaert*, 426 U.S. at 142–43 (NPS can restrict pumping of ground water underneath privately held land). The Ninth Circuit's extension of the doctrine gives the United States authority over "all the bodies of water on which the United States' reserved rights *could at some point* be enforced—*i.e.*, those waters that are or *may become necessary* to fulfill the primary purposes of the federal reservation at issue." *Sturgeon v. Frost*, 872 F.3d 927, 936 (9th Cir. 2017) (emphasis original; citation omitted). Combined with this Court's precedent that includes private and ground waters within the ambit of the doctrine, the scope of the Ninth Circuit's expanded interpretation is virtually limitless. Because the Ninth Circuit seemingly requires no proof that the United States actually needs the water to achieve the alleged purpose of the reservation, the real-world implications of the Ninth Circuit's holding push the doctrine beyond the constraints that this Court has consistently applied. Any water hydrologically connected to a federal reservation could be comprehensively regulated with little more than the United States' assertation that it may, at some point in the nonspecific future, be necessary to fulfill a purpose of a federal reservation.

C. Had Congress Intended to Empower the NPS to Regulate Activity on Waterways Within National Preserves, It Could Have Done So.

As explained in Petitioner John Sturgeon's brief, Congress is well aware of how to include in legislation an express statement of its wishes to bring waters or submerged lands within the scope of NPS jurisdiction.

See Petitioner Br. at 32 (providing example of the statute establishing Olympic National Park in which Congress explicitly identified that the Park would include "all submerged lands and waters of Lake Ozette, Washington and the Ozette River, Washington."). The establishing language of several other NPS-administered lands similarly demonstrates that whenever Congress wants to give the NPS authority over submerged lands or waters in or near a National Park unit, it has done so expressly. *See, e.g.*, 16 U.S.C. § 398c (Virgin Islands National Park); 16 U.S.C. § 460cc (Gateway National Recreation Area); 16 U.S.C. § 410ff (Channel Islands National Park); and 16 U.S.C. § 459c-1 (Point Reyes National Seashore). Congress could have included a similar express authorization for waters or submerged lands within the National Preserves at issue in this litigation in order to place them under the regulatory authority of the NPS, but it did not.

D. The NPS's Exercise of Authority Over Waters Within CSU Boundaries Deprives Hunters of Access to Hunting Opportunities.

Petitioner John Sturgeon filed suit in federal district court in Alaska to challenge the NPS's exercise of authority to prohibit Sturgeon from operating his hovercraft on navigable waters flowing within the boundaries of the Yukon-Charley Rivers National Preserve. Sturgeon, a hunter, used his hovercraft to travel to favored moose hunting locations in Alaska. The authority that Sturgeon challenges impacts far more than his ability to visit a moose hunting area or even the ability of hunters generally to use hovercrafts within the boundaries of CSUs in Alaska. This authority threatens the ability of hunters and guides generally throughout Alaska to access

hunting opportunities located both inside and outside the boundaries of CSUs managed by the NPS. Unless this Court rejects the Ninth Circuit's interpretation of the NPS's authority to regulate activity on waters within CSU boundaries, hunters will be deprived of essential means of transportation to the remote hunting opportunities in and near many of the lands administered by the NPS in Alaska.

Float planes, because they can land on water, provide an essential means of transportation for hunters in Alaska. The use of float planes in CSUs is at risk because the Ninth Circuit upheld the NPS's asserted authority, to regulate activities on

> navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or lowlands

36 C.F.R. § 1.2(a)(3). Not only would that authority enable the NPS to prohibit the use of hovercrafts on such waters within the boundaries of CSUs administered by the NPS, but pursuant to 36 C.F.R. § 2.17(a), it would also result in the prohibition against the use of most types of aircraft on those waters:

> (a) The following are prohibited:
>
> (1) Operating or using aircraft on lands or waters other than at locations designated pursuant to special regulations.

Id. § 2.17(a).[3]

A prohibition on aircraft use of waters within CSU boundaries has a major impact on hunter access to hunting opportunities in Alaska. The NPS administers approximately 43,522,000 acres of CSU lands in the State. 16 U.S.C. §§ 410hh, 410hh-1. Almost half of those lands were established under ANILCA as National Preserves, including the Anakchak (~ 367,000 acres), Bering Land Bridge (~ 2,457,000 acres), Denali (~ 1,330,000 acres), Gates of the Arctic (~ 900,000 acres), Glacier Bay (~ 57,000 acres), Katmai (~ 308,000 acres), Lake Clark (~ 1,214,000 acres), Noatak (~ 6,460,000 acres), Wrangell-St. Elias (~ 4,117,000 acres), and Yukon-Charley Rivers National Preserves (~ 1,713,000 acres) (totaling ~ 18,923,000 acres). *Id.* National Preserves are a major component of the lands in Alaska open to hunting.

Alaska's National Preserves, like many lands in the State, are actively hunted. Congress specifically mandated that the NPS authorize hunting on National Preserves in Alaska.

> A National Preserve in Alaska shall be administered and managed as a unit of the

3. ANILCA expressly grants the NPS authority to limit aircraft landings on only two portions of the waterways within the CSUs. For Kobuk Valley National Park, Congress directed "[e]xcept at such times when, and locations where, to do so would be inconsistent with the purposes of the park, the Secretary shall permit aircraft to continue to land at sites in the upper Salmon River watershed." 16 U.S.C. § 410hh(6). ANILCA grants similar authority to the NPS for limiting aircraft landings in the Upper Charley River watershed. *Id.* at § 410hh(10).

> National Park System in the same manner as a national park except as otherwise provided in this Act and except that the taking of fish and wildlife for sport purposes and subsistence uses, and trapping ***shall be allowed in a national preserve*** under applicable State and Federal law and regulation.

16 U.S.C. § 3201 (emphasis added); *see also* 36 C.F.R. § 1340(d).

Although Alaska's National Preserves are open to hunting, access to that hunting can be difficult. Few roads run through or access all areas of those Preserves. As acknowledged by the National Park Service itself, several of the National Preserves cannot be reached by road at all. "While some of Alaska's national parklands are accessible by road, many can only be reached by boat, plane, or non-motorized transportation." NATIONAL PARK SERVICE, ALASKA, VISIT, https://www.nps.gov/locations/alaska/visit.htm (last visited Aug. 11, 2018). For example, boats and aircraft provide the only access to Katmai National Park and Preserve. "Hunting and trapping within Katmai National Preserve requires extensive planning. Access in most cases will involve air taxi service via float plane from King Salmon or one of the other surrounding villages." NATIONAL PARK SERVICE, KATMAI, SPORT HUNTING, https://www.nps.gov/katm/planyourvisit/hunting.htm (last visited Aug. 11, 2018). Similarly, no roads lead into Gates of the Arctic National Park. "Most visitors access the park by air taxi, in small aircraft equipped with floats or tundra tires." NATIONAL PARK SERVICE, GATES OF THE ARCTIC, DIRECTIONS, https://www.nps.gov/gaar/planyourvisit/directions.htm (last visited Aug. 11, 2018).

Hunters need to be able to land float planes on the waters running through National Preserves to reach the bear, moose, caribou, sheep, goat and other species that Congress directed the NPS to make available for hunting. The NPS's regulation, 36 C.F.R. § 2.17, if broadly extended to all non-federal waters running through National Preserves by 36 C.F.R. § 1.2, could largely prohibit the use of aircraft on those waters. With diminished ability to reach those hunting opportunities by float plane, hunters will lose the access they require to participate in hunting on National Preserves that Congress mandated.

The world-class hunting opportunities in Alaska are not only important to Alaska residents, but to the residents of all the states (and other countries). Nonresidents flock to Alaska to experience some of the best hunting in the world.[4] As the Alaska Department of Fish and Game ("Department") explains:

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4. While *amicus curiae* Safari Club is a hunting/conservation organization, many of its members also enjoy or make their livelihoods from fishing. Like hunting, fishing is extremely popular in Alaska. The estimated number of anglers in Alaska in 2016 was 464,624 and the number of angler-days fished in Alaska in 2016 was 1,982,300. ALASKA DEPARTMENT OF FISH AND GAME, ALASKA SPORT FISHING SURVEY, STATEWIDE, http://www.adfg.alaska.gov/sf/sportfishingsurvey/index.cfm?ADFG=region.home (last visited Aug. 12, 2018). As the Department states, "Alaska is a world-renowned sport fishing destination. In fact, in this land of 3,000 rivers, 3 million lakes and 6,640 miles of coastline, a sport angler's greatest challenge can just be deciding where to go." ALASKA DEPARTMENT OF FISH AND GAME, SPORT FISHERIES, http://www.adfg.alaska.gov/index.cfm?adfg=fishingSport.main (last visited Aug. 12, 2018).

> Alaska's hunting reputation is justly deserved. One-fifth the size of the entire United States, Alaska offers wilderness hunting opportunities found in few other locations in the world. It is true that huge moose occur here and that vast caribou herds dominate the landscape in some areas and seasons. Numerous mountain ranges support populations of Dall sheep and mountain goats, and Sitka black-tailed deer thrive in the coastal forests. Once extirpated from the state, muskox now range over the western and arctic coastal wilderness. Large numbers of black and brown bear also exist here. And wolves, which are found across most of the state, are also abundant in some areas.

ALASKA DEPARTMENT OF FISH AND GAME, INTRODUCTION TO ALASKA BIG GAME HUNTING, http://www.adfg.alaska.gov/index.cfm?adfg=hunting.biggameintro (last visited Aug. 12, 2018). Because of its climate and terrain, Alaska offers some of the most challenging hunting in the United States. *Id.* The Department describes some of the animals that Alaska residents and nonresidents hunt:

- "Hunting is used to manage the size of these herds, and bison hunts are among the most popular drawing hunts in Alaska. For example, with the Delta bison hunt, each year roughly 15,000 hunters apply for about 100 permits, and on average about 74 animals are harvested there. Statewide, the harvest of plains bison averages 92 animals/year." ALASKA DEPARTMENT OF FISH AND GAME, BISON HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=bisonhunting.main (last visited Aug. 11, 2018).

- "Alaska has an estimated 30,000 brown bears statewide. In 2007, about 1,900 brown bears were harvested in Alaska. Of that figure, about 700 were taken by Alaska residents and roughly 1,200 (or 67 percent) were taken by nonresidents." ALASKA DEPARTMENT OF FISH AND GAME, BROWN/GRIZZLY BEAR HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=brownbearhunting.main (last visited Aug. 11, 2018).

- "On average, people harvest about 22,000 caribou in Alaska each year." ALASKA DEPARTMENT OF FISH AND GAME, CARIBOU HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=caribouhunting.main (last visited Aug. 11, 2018).

- "Alaska's Dall sheep are popular with nonresident hunters, and the harvest is split fairly evenly between residents and nonresidents. In 2007, for example, nonresidents took 403 sheep, while resident hunters took 513, or about 57 percent." ALASKA DEPARTMENT OF FISH AND GAME, DALL SHEEP HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=sheephunting.main (last visited Aug. 11, 2018).

- "In Southeast Alaska, the Sitka black-tailed deer is the most frequently pursued species of big game. Between 1987 and 2007, an average annual harvest of about 12,330 deer has occurred in Alaska." ALASKA DEPARTMENT OF FISH AND GAME, SITKA BLACK-TAILED DEER HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=deerhunting.main (last visited Aug. 11, 2018).

- "Alaskans and nonresidents annually harvest 6,000 to 8,000 moose, which translates into about 3.5 million pounds of usable meat." ALASKA DEPARTMENT OF FISH AND GAME, MOOSE HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=moosehunting.main (last visited Aug. 11, 2018).

- "In 2007, 518 mountain goats were harvested in Alaska, 158 by nonresidents (about 30 percent) and 360 by resident hunters." ALASKA DEPARTMENT OF FISH AND GAME, GOAT HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=goathunting.main (last visited Aug. 11, 2018).

- "Migratory bird hunters in Alaska have numerous opportunities to harvest waterfowl, sandhill cranes, and snipe. Whether decoying brant over eel grass beds at Cold Bay, jump-shooting dabblers on Minto Flats, or waiting in a pit blind for a crack at speckle bellies in Delta, the variety of bird species hunted and the diversity of hunting venues are unique to the state. Alaska's marine and freshwater wetlands produce a fall flight of about 12 million ducks and over one million geese to all four North American flyways and neighboring countries. They also provide vital staging habitat for migrants that breed in Canada and Russia. Approximately 8,800 waterfowl hunters in Alaska can expect to harvest close to 70,000 ducks and 7,000 geese per hunting season." ALASKA DEPARTMENT OF FISH AND GAME, WATERFOWL HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=waterfowlhunting.main (last visited Aug. 11, 2018).

- "Wolves are classified as big game (in the hunting regulations) and as furbearers (in the trapping regulations). Wolves may be harvested with a hunting license and/or a trapping license." ALASKA DEPARTMENT OF FISH AND GAME, WOLF HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=wolfhunting.opportunities (last visited Aug. 11, 2018).

- "The harvest of muskox in Alaska has increased steadily in recent years. For example, 98 animals were harvested in 2003, and 258 were harvested in 2007." ALASKA DEPARTMENT OF FISH AND GAME, MUSKOX HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=muskoxhunting.main (last visited Aug. 11, 2018).

- "Small game hunting provides a wonderful opportunity to introduce young and new hunters to the heritage of hunting. It offers an easy, cost effective, and accessible opportunity to begin a friendship, tradition, and outdoor activity that can last a lifetime. Small game hunting tends to be much more casual than big game hunting, does not require special permits, tags, or stamps, and a group can enjoy a midday hunt and be home for dinner. A child introduced to hunting through flushing hares out of a local willow draw or walking a gravel road for spruce grouse will become hooked on the tradition and friendship that going outdoors with friends and family provides." ALASKA DEPARTMENT OF FISH AND GAME, SMALL GAME HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=smallgamehunting.main (last visited Aug. 11, 2018).

In addition to being extremely popular, hunting supports Alaska's economy and provides a living to many guides and outfitters, who mainly cater to nonresidents. Hunting also benefits others who provide services to the out-of-state visitors. As described in one report:

> In 2012, guides contracted with 3,207 hunters, 3,055 of them nonresidents. In total, hunters spent $51 million on guided hunts. Of the total, nonresident hunters spent an estimated $48 million. In addition to hunting packages, non-resident hunters and their companions spent another $3.5 million on lodging, food and beverage, clothing, souvenirs, and outdoor equipment, among other purchases while in Alaska. Dollars spent in Alaska by non-residents provides new dollars that help support the state's economy.
>
> Including $29.5 million in direct and indirect (multiplier effects) associated with this spending, guided hunting in Alaska accounted for $78 million in total economic activity in 2012. [Page 1]

The McDowell Group, *The Economic Impacts of Guided Hunting in Alaska*, (February 2014), http://www.alaskaprohunter.org/Economic_Impacts_of_Guided_Hunting_Final.pdf (last visited Aug. 12, 2018). The report also noted that a significant percentage of the guided hunting occurs on federal lands, including NPS lands:

> Contracting guides reported that ... [a]lmost half of revenue was earned hunting on federal

> lands, including US Fish and Wildlife Service (22 percent), US Forest Service (11 percent), ***NPS (9 percent)***, and BLM (4 percent). Eight percent was derived from private land (including Alaska Native Corporation land)." [Page 9, emphasis added]

Id. (emphasis added). As examples of some of the opportunities available in NPS lands in Alaska, several outfitters offer guided hunts for desirable big game species on National Preserve lands. On the websites for some of the National Preserves, the NPS itself directs visitors to outfitters providing these services. For example, the website for Denali National Park and Preserve refers visitors to many different businesses that provide services within the Park and Preserve, including two listed as "Sport Hunting Guides/Outfitters." NATIONAL PARK SERVICE, DENALI, GUIDED ACTIVITIES IN DENALI, https://www.nps.gov/dena/planyourvisit/business-with-park.htm (last visited Aug. 12, 2018). Another website lists ten different companies that provide hunting guide and outfitter services for Wrangell-St. Elias National Park and Preserve. NATIONAL PARK SERVICE, ALASKA, DIRECTORY OF COMMERCIAL SERVICE PROVIDERS, https://www.nps.gov/locations/alaska/services-wrangell-st-elias.htm (last visited Aug. 12, 2018). The outcome of this case will affect innumerable world-class hunting and fishing opportunities and directly impact companies and individuals that rely on those opportunities.

CONCLUSION

Safari Club asks this Court to reverse the Ninth Circuit's ruling, invalidate the illegal restrictions that the NPS has imposed on activities on waterways within

National Preserves in Alaska and resolve all issues related to John Sturgeon's challenge. Safari Club seeks a ruling from this Court that will prevent the NPS from having the ability to exercise authority over the use of these waterways in ways that will make it more difficult, if not impossible, for hunters to travel to valued hunting sites and enjoy Alaska's wildlife resources. Safari Club asks this court to resolve this matter, not only to clarify that John Sturgeon has the right to access his favored moose hunting areas in the Yukon-Charley Rivers National Preserve, but to establish that activities on the waterways that run through National Preserves in Alaska are under the authority of the State of Alaska, not the National Park Service. This Court's reversal of the Ninth Circuit's ruling and invalidation of the NPS's illegal interpretation of its regulatory authority will make certain that all hunters and anglers will continue to be able to access valuable hunting and fishing activities via the waters that run within the CSUs in Alaska.

Respectfully submitted,

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